IN THE

Supreme Court of the United States

OCTOBER TERM, 1975
NO. 75-7081

STANLEY MARKS, HARRY MOHNEY, GUY WEIR, AMERICAN AMUSEMENT CO., INC., and AMERICAN NEWS CO., INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT EUGENE SMITH, Esquire
GILBERT H. DEITCH, Esquire
2005 One Hundred Colony Square
Atlanta, Georgia 30361

Attorneys for Petitioners.

Of Counsel:

ANDREW DENNISON, Esquire
216 East Ninth Street
Cincinnati, Ohio 45202

The Paul M. Harrod Company, Baltimore, Maryland 21234

INDEX

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases

Page

Other

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975
NO. _____

STANLEY MARKS, HARRY MOHNEY, GUY WEIR, AMERICAN AMUSEMENT CO., INC., and AMERICAN NEWS CO., INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on July 30, 1975.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 520 F.2d 913 (CA 6 1975) and is set forth in Appendix A hereto.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 30, 1975. An application for rehearing was timely filed and denied on September 15, 1975. On October 6, 1975, Mr. Justice Stewart granted an extension of time to and including November 14, 1975, within which to file this Petition. This Court's jurisdiction is invoked under *Title 28 United States Code §1254(1).*

QUESTIONS PRESENTED

1. Whether defendants in obscenity prosecutions which are founded upon conduct occurring prior to this Court's decisions in *Miller v. California* and its companion cases are entitled to jury instructions founded upon the *Roth-Memoirs* obscenity formulation prevailing at the time of their conduct?

2. Whether an appellate court, in performing its duty enunciated in *Jacobellis v. Ohio,* 378 U.S. 184 (1964), of independently determining the issue of obscenity, must itself view the materials charged as obscene?

3. Whether a jury may be instructed to determine the issue of obscenity on the basis of community standards based upon a community comprised of the precise geographical boundaries of a federal judicial district when all of the jurors are both drawn from and constantly exposed to the influences of other communities?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fifth Amendments to the United States Constitution are set forth in Appendix B hereto.

STATEMENT

The Petitioners, three individuals and two corporations, were charged in the Eastern District of Kentucky in a nine-count indictment alleging a single count of conspiracy in violation of *Title 18 United States Code §371* and eight substantive counts of interstate transportation of obscene films for the purpose of sale and distribution in violation of *Title 18 United States Code §1465.*

Each of the substantive counts in the indictment related to a separate allegedly obscene film exhibited at the Cinema X Theatre in Newport, Kentucky. The indictment charged that each of said films had been transported in interstate commerce for the purpose of exhibition at the Cinema X Theatre. The conspiracy count was founded upon an alleged agreement among the Petitioners to cause the instances of interstate transportation upon which the substantive counts were predicated.

After a trial by jury, all of the Petitioners were acquitted of one substantive count, and all were convicted on the conspiracy count. All of the Petitioners except American News Co., Inc. were also convicted on the remaining substantive counts.

All of the conduct which formed the basis for the substantive counts of the indictment occurred between January 15,

1973, and February 27, 1973. The conspiracy count was predicated upon an alleged agreement beginning August 1, 1970, and continuing through February 27, 1973. Thus the latest date pertinent to any of the conduct charged against the Petitioners was February 27, 1973. This was several months prior to the announcement by this Court, on June 21, 1973, of new constitutional guidelines in the area of obscenity regulation. See *Miller v. California,* 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973); *Kaplan v. California,* 413 U.S. 115 (1973); *United States v. 12 200-Foot Reels of Film,* 413 U.S. 123 (1973); *United States v. Orito,* 413 U.S. 139 (1973).

The case came to be heard by a jury trial commencing October 9, 1973. Because the conduct for which Petitioners were prosecuted occurred prior to this Court's formulation of the obscenity standards enunciated in *Miller* and its companion cases, the Petitioners requested the Court to instruct the jury on the "*Roth-Memoirs*" obscenity formulation set forth in *Memoirs v. Massachusetts,* 383 U.S. 413 (1966) and *Roth v. United States,* 354 U.S. 476 (1957). The Court refused the request and, over objection, instructed the jury upon the basis of the "*Miller*" obscenity formulation.

The jury was further instructed that the obscenity of the films was to be judged by the application of local community standards. They were instructed, over the objections of the Petitioners, that the community from which those standards were to be drawn was that comprised of the Eastern District of Kentucky. Petitioners objected to this charge on the ground that the subject films were exhibited at the Cinema X Theatre located in what is essentially a single major metropolitan area

comprised of the adjacent cities of Newport, Kentucky, and Cincinnati, Ohio.

After conviction in the United States District Court for the Eastern District of Kentucky, all of the Petitioners herein appealed. Upon appeal, the United States Court of Appeals for the Sixth Circuit affirmed the judgments of conviction in a split decision with the Circuit Judge McCree dissenting. A Petition for Rehearing was timely filed and denied in a further split decision with Judge McCree once again in dissent.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES COURTS OF APPEAL FOR THE FIRST, FIFTH, NINTH AND DISTRICT OF COLUMBIA CIRCUITS ON THE ISSUE OF WHETHER, IN OBSCENITY PROSECUTIONS BASED UPON CONDUCT OCCURRING PRIOR TO *MILLER v. CALIFORNIA,* DEFENDANTS ARE ENTITLED TO JURY INSTRUCTIONS BASED UPON THE *ROTH-MEMOIRS* OBSCENITY STANDARD PREVAILING AT THE TIME OF THE CONDUCT.

The conduct upon which the prosecutions below were based all occurred at least several months prior to the announcement by this Court, on June 21, 1973, of new constitutional guidelines in the area of obscenity regulation. *Miller v. California,* 413 U.S. 15 (1973) and its companion cases. The conduct with which Petitioners were charged thus occurred

when the prevailing obscenity formulation was one commonly referred to as the "*Roth-Memoirs*" standard. *Memoirs v. Massachusetts,* 383 U.S. 413 (1966); *Roth v. United States,* 354 U.S. 476 (1957).

Since the trial below occurred subsequent to the annoucement of new guidelines in *Miller, supra,* the District Court was faced with the question of whether the jury should be instructed on the *Miller* guidelines or on the *Roth-Memoirs* guidelines which prevailed at the time of the conduct charged. Over Petitioners' objections, the District Court chose to instruct the jury on the newer obscenity standards set forth in *Miller.*

The propriety of such a course of action has been expressly addressed by United States Courts of Appeal for the First, Fifth, Ninth, and District of Columbia Circuits. All of those Courts found such jury instructions, in the circumstances presented here, to constitute a denial of due process. The Sixth Circuit Court of Appeals in this case acknowledged such holdings in other Circuits and, in a split decision, expressly declined to follow them. In dissent, Judge McCree voiced agreement with the prior decisions of the other Circuit Courts.

The issue of applying the *Miller* standard retroactively to conduct which occurred prior to the announcement of the *Miller* decision was addressed by the Fifth Circuit Court of Appeals in *United States v. Thevis,* 484 F.2d 1149 (CA 5 1973). The trial in *Thevis* had occurred prior to the *Miller* decision and the jury instructions there were thus based upon the *Roth-Memoirs* obscenity formulation. In reviewing the convictions after the *Miller* decision, the Court of Appeals took the *Miller* formulation into account. Since the conduct with which Thevis

was charged occurred while the *Roth-Memoirs* standard prevailed, however, the Fifth Circuit held that he could not be convicted for any material which did not meet the *Roth-Memoirs* obscenity standard:

> "However, we do believe it to be our duty, under the *Miller* remands and in view of the care with which the judiciary must protect First Amendment rights, to assure that no one is convicted under the earlier extant standards if they are more restrictive of pornography than those in *Miller.* Thus when we make, as we are required to do , an 'independent constitutional judgment on the facts of the case as to whether the material is constitutionally protected,' Jacobellis v. Ohio, 1964, 378 U.S. 184, 190, 84 S.Ct. 1676, 12 L.Ed.2d 793; United States v. Groner, 5 Cir., 1973, supra, we shall consider both the *Miller* and *Memoirs* definitions of obscenity. Any count based on a magazine which is not obscene under both of these standards is due to be dismissed.
>
> * * * * *
>
> "Since we have ruled that appellants are to receive any protection provided by either applicable standard, their convictions on the six counts based on magazines we find to be protected by *Memoirs* must be reversed. The judgment of conviction as to the other six counts is affirmed." 484 F.2d, at 1155-1157.

The Fifth Circuit decision in *Thevis* was later cited and followed by the First Circuit in *United States v. Palladino,* 490 F.2d 499 (CA 1 1974):

> "The defendants are caught in a period of transition, their prosecutions having taken place before the

Miller decisions. They cannot fairly be subjected to penalties for violation of rules established after their actions. On the other hand, the remand of the entire group of pending obscenity prosecutions suggests to that the extent that *Miller* creates protections not afforded by prior standards, these cannot be denied to persons whose prosecutions have not terminated. Therefore with due regard for First Amendment rights we adopt the position that on remand the material allegedly in violation of 18 U.S.C. §1461 must be found to be obscene under both the *Miller* and the *Roth-Memoirs* standards or the defendants must be acquitted. *See* United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973)." 490 F.2d, at 500-501.

The decision not to apply the *Miller* standards retroactively was adopted over the dissent of Circuit Judge Aldrich who stated:

"With all respect, I do not find the Fifth Circuit's decision in United States v. Thevis persuasive." 490 F.2d, at 504.

Unlike the instant case, *Thevis* and *Palladino* involved situations in which both the conduct charged and the trials occurred prior to the *Miller* decision. The precise fact situation here presented – a post-*Miller* trial founded upon pre-*Miller* conduct – was before the Ninth Circuit in *United States v. Jacobs*, 513 F.2d 564 (CA 9 1975):

"Appellant John Andrew Jacobs was indicted, tried and convicted for violation of 18 U.S.C. §1462 (knowingly receiving an obscene film transported in interstate commerce) after June 23, 1973, the date

on which the Supreme Court rendered the decision in *Miller*. The date of the alleged offense, however, was May 10, 1973, before *Miller* was decided." 513 F.2d, at 565.

As in the instant case, the jury in *Jacobs* was instructed on the basis of the *Miller* obscenity standards. The Ninth Circuit reversed the conviction in *Jacobs*, finding that such instructions constituted a due process violation equivalent in effect to an *ex post facto* law:

"The jury which convicted appellant was instructed using the definition of 'obscenity' enunciated in *Miller*, rather than the *Roth-Memoirs* definition which preceded it. Appellant argues that the *Miller* definition expanded the area of unprotected speech which is now made subject to criminal sanction under §1462, and that retroactive application of such expanded standards to his conduct was effectively the application of *ex post facto* law, violating his due process right to notice of the conduct proscribed. As we agree that the *Roth-Memoirs* gloss on 'obscenity' did not give appellant adequate notice that his conduct would be judged by the expanded standard ultimately applied, we reverse his conviction." *Id.*, at 565.

The Court went on to explain the reasoning behind its decision as follows:

"We think that it is beyond controversy that the third prong of the *Miller* test expanded the field of potential criminal liability; indeed, the test was explicitly adopted to ease the prosecutor's burden. *Miller*, at 22, 93 S.Ct. 2607. When appellant received the film, he would have thought the act proscribed

> if he thought a jury would ultimately decide that the film was 'utterly without redeeming social value.' He could not have known that it was a crime to receive a pruriently interesting film which a jury might later determine to be lacking in 'serious literary, artistic, political or scientific value.' As appellant lacked notice of the subsequent expansion of the statute, due process fairness bars the retroactive judgment of his conduct using the expanded definition, and the conviction cannot stand." *Id.*, at 566.

The same fact situation was later presented to the Fifth Circuit in *United States v. Wasserman*, 504 F.2d 1012 (CA 5 1974). The defendants in *Wasserman* were indicted in 1972 for conduct which occurred from 1970 through 1972. Subsequent to their indictment, however, the *Miller* decision was announced and the jury in the *Wasserman* case was instructed on the obscenity definition set forth in *Miller*. In reversing the conviction, the Fifth Circuit acknowledged and expressly followed the Ninth Circuit decison in *Jacobs:*

> "Appellants' position is further supported by United States v. Jacobs (CA 9 1974) the one circuit court opinion deciding the issue of the retroactivity of *Miller*. In *Jacobs* the court held that due process fairness bars the retroactive judgment of his conduct using the expanded definition, and the conviction cannot stand. We think *Jacobs* is correct." 504 F.2d, at 1014-1015.

Precisely the same conclusion was reached by the Court of Appeals for the District of Columbia Circuit in *United States v. Sherpix, Inc.*, 512 F.2d 1361 (CA D.C. 1975). In reversing the convictions, the Court noted:

> "At the times appellants distributed and exhibited the film, they could expect to escape conviction unless a jury concluded that the film was 'utterly without redeeming social value.' Since appellants were not afforded the opportunity to conform their behavior to the law as subsequently construed, due process bars the retroactive application of *Miller* test (c), and the instant convictions must be reversed." 512 F.2d, at 1366.

In reaching this decision, the District of Columbia Circuit acknowledge and expressly followed the prior decisions of the Fifth and Ninth Circuits on the same issue:

> "The two circuits which have considered this issue have reached similar conclusions regarding the retroactivity of the *Miller* tests. See United States v. Wasserman, 504 F.2d 1012 (5th Cir. 1974); United States v. Jacobs, 513 F.2d 564 (9th Cir. 1974)." *Id.*

The majority in the Sixth Circuit decision below acknowledged in the above decisions of other Circuit Courts. As to the First Circuit decision in *Palladino, supra,* the Court below stated: "We agree with Judge Aldrich's dissent." 520 F.2d, at 922. The Court then went on to acknowledge and expressly decline to follow the decisions of the other Circuits:

> "We decline to follow Wasserman and Jacobs for the same reason that we did not follow Palladino. The time for filing in the Supreme Court petitions for certiorari, has not expired in either of these two cases." *Id.*

The conflict in the Circuits was thus expressly recognized by the majority below. It was also recognized by Judge McCree

who stated, in dissent, that he would follow the decisions in *Palladino, Jacobs, Wasserman* and *Sherpix.*

It should be noted that the majority below was incorrect in stating that the time for filing petitions for writs of certiorari had not expired in *Jacobs* or *Palladino.* As was pointed out below in the Petition for Rehearing, the time has long since expired and no petitions for certiorari have been filed by the Government in any of the cases with which the decision below conflicts.

It should also be noted that other courts, in addition to the Courts of Appeal above noted, have reached results contrary to those arrived at below. *See United States v. Lang,* 361 F. Supp. 380 (C.D. Cal. 1973); *Detco, Inc. v. McCann,* 380 F. Supp. 1366 (E.D. Wis. 1974). *See also, United States v. Cutting,* ____ F.2d ____ (CA 9 1975) (No. 71-2570 decided March 26, 1975). In *Cutting* the Ninth Circuit cited its previous decision in *Jacobs, supra,* and went on to conclude that the applicable standard on review is the community standards which prevailed at the time of the conduct charged.

The majority below gratuitously noted its view that the materials are obscene under either the *Roth -Memoirs* or the *Miller* obscenity standards. This conclusion is of suspect weight in light of the fact that "the films were not seen by any member of the panel." 520 F.2d, at 923 n.1. Moreover, the conclusion, even if properly founded, ignores the fact that the question presented deals with the propriety of *jury* instructions. Whatever the opinion of the Court of Appeals, Petitioners contend, as has been held in other Circuits, that they are entitled to have the jury instructed on the *Roth-Memoirs* formulation.

The result below is thus different than that which would obtain in the First, Fifth, Ninth, and District of Columbia Circuits. While Petitioners' convictions would have been reversed had they occurred in any of such Circuits, they stand affirmed because of the geographical accident of their occurrence within the Sixth Circuit. In order to eliminate such anomalous results, a Writ of Certiorari should be granted in order to resolve the conflict.

II.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON THE ISSUE OF WHETHER APPELLATE COURTS, IN REVIEWING OBSCENITY CONVICTIONS, MUST INDEPENDENTLY REVIEW THE MATERIALS CHARGED AS OBSCENE.

The Court of Appeals, in affirming Petitioners' convictions, failed to independently review the materials charged as obscene. This fact was documented by Judge McCree who stated, in dissent, as follows:

> "Although the challenged films were lodged with the Court as exhibits, the majority of the panel decided that an examination of them was not necessary for decision. Accordingly, the films were not seen by any member of the panel." 520 F.2d, at 923 n.1.

This course of action, however, is in conflict with a recent decision of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit, in *Clicque v. United States,* 514 F.2d

923 (CA 5 1975), spoke on this issue in a unanimous opinion authored by Judge Goldberg. *Clicque* involved an obscenity conviction founded upon a plea of guilty. Despite the guilty plea, the Court noted that the judiciary retained a duty of independent review:

> "We believe that Clicque's First Amendment rights may have been infringed and that he may have been sent to jail for protected writing. We conclude that in this constitutionally sensitive area, the convicting court was under a constitutional duty to assure itself of the unprotected nature of Clicque's writing." 514 F.2d, at 925-926.

On the status of that independent review at the appellate level, the Court noted:

> "The rule that a guilty plea does not excuse the court from reviewing the actual materials on which the plea is based applies with equal force to the district judge as it does to the appellate judge. The rule requires an 'independent assessment' of the facts before a conviction may be upheld in order to see whether the material is constitutionally protected." *Id.*, at 927.

The same point was later made as follows :

> "The requirement for the district court would seem to be the same as that for the appellate court. It must look at the materials and assess them according to the criteria given us by the Supreme Court." *Id.*, at 928 n.5.

There is thus a clear conflict among the Courts of Appeals on the issue of the necessity of an independent appellate review

of materials charged as obscene. This Court has spoken on the issue several times, always concluding that an independent review is necessary.

The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level had its origins in this Court's decision in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962). That case involved action by a local postmaster in withholding delivery of certain magazines after finding them obscene. The publishers who had mailed the magazines brought suit in the United States District Court seeking injunctive relief, but their complaint was dismissed without opinion. The Court of Appeals affirmed the dismissal, holding that the evidence supported the administrative findings that the magazines were obscene and thus non-mailable matter.

This Court reversed in a judgment announced by Mr. Justice Harlan. The Court thought the dispositive question to be whether or not the magazines were in fact obscene. 370 U.S., at 488. On this issue, the Court noted that the determination below had been made under improper assumptions as to the law of obscenity. The Court, however, decided against remanding the case for an initial determination of the obscenity issue in a lower court:

> "Whether this question [of obscenity] be deemed one of fact or of mixed fact and law, see Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn L Rev 5, 114-115 (1960), we see no need of remanding the case for initial consideration by the Post Office Department or the Court of Appeals of this missing factor in their determinations." 370 U.S., at 488.

The Court decided that the determinations of that issue must ultimately rest with it:

> "That issue, involving factual matters entangled in a constitutional claim, see Grove Press, Inc. v. Christenberry (CA 2 NY) 276 F.2d 433, 436, is ultimately one for this Court. The relevant materials being before us, we determine the issue for ourselves." *Id.*

The doctrine of independent review was again invoked by this Court in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). *Jacobellis* involved a conviction of a Cleveland, Ohio motion picture theatre operator for possessing and exhibiting the film "The Lovers." On appeal, this Court reversed in a judgment announced by Mr. Justice Brennan. On the issue of independent review, Mr. Justice Brennan, relying in part upon *Manual Enterprises, Inc. v. Day, supra*, stated:

> "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See Roth v. United States, supra, 354 U.S., at 497-498, 1 L.Ed.2d at 1541, 1515 (separate opinion). Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' *Id.*, at 498, 1 L.Ed.2d at 1514; see Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488, 8 L.Ed.2d 639, 647, 82 S.Ct. 1432 (opinion of Harlan, J.)." 378 U.S., at 188.

It was noted that the duty of appellate review is not a pleasant one, but it was held to be one which must be exercised:

> "We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by "sufficient evidence." The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees." 378 U.S., at 187-188.

Mr. Justice Brennan, in an opinion joined by Mr. Justice Goldberg, went on to conclude that reversal was necessary since the film "The Lovers" was not obscene. This conclusion as to the film was concurred in by Mr. Justice Stewart.

The continuing validity of the *Jacobellis* doctrine and of the appellate duty it imposes was affirmed by this Court only recently in the case of *Jenkins v. Georgia*, 418 U.S. 153 (1974). That case involved a conviction under a state obscenity statute founded upon the exhibition of the film "Carnal Knowledge." This Court reversed the conviction based upon its own viewing of the film, and the finding that the film could not, as a matter of constitutional law, be held obscene.

This same course of independent review has been followed by this Court in several cases. *See, e.g., Kois v. Wisconsin*, 408 U S. 229 (1972); *Hamling v. United States*, 418 U.S. 87 (1974). Thus, though the Courts of Appeal are in conflict, this Court has apparently enunciated the duty of independent appellate

review of materials upon which obscenity convictions are predicated. Such considerations aside, however, the conflict of the decision below with the decision of the United States Court of Appeals for the Fifth Circuit in *Clique, supra,* is clearly in need of a resolution which only this Court can provide.

III.

THE DENIAL OF PETITIONERS' REQUESTS TO CHARGE THE JURY ON THE LOCAL COMMUNITY STANDARDS OF CINCINNATI-COVINGTON AND INSTRUCTING THE JURY ON THE COMMUNITY STANDARDS OF THE ENTIRE EASTERN DISTRICT OF KENTUCKY DEPRIVED PETITIONERS OF A FAIR TRIAL AND DUE PROCESS, CONTRARY TO THE FIRST, FIFTH, AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The District Court in this case instructed the jury on the community standards of the entire Eastern District of Kentucky. Although seemingly proper under the authority of *Miller v. California,* 413 U.S. 15 (1973), other factors in this case show that this was improper and prejudicial to the Petitioners.

Miller held that in instructing a jury regarding what appeals to the prurient interest and what is obscene, "national standards" need not be used. Although California state-wide standards were approved in that case, the Court left unclear how the abstract "local community" is to be defined. It was noted that communities may be national, state, or even more localized. They can be regional or geographic or policial.

The issue was subject to certain clarification in *Hamling v. United States,* 418 U.S. 87 (1974), where this Court seemingly approved a federal judicial district as one type of a "community." In the companion case of *Jenkins v. Georgia,* 418 U.S. 153 (1974), it was further held that instructions pertaining to a "community" are proper even without defining that community.

> "A state may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller* without further specification as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller.*" 418 U.S., at 157.

Howevermuch the above explication may seem sufficient, the nature of the "community" in the instant case defies such easy categorization. The Eastern District of Kentucky covers the entire eastern half of the state, running from Ohio on the North, to Tennessee on the South, and to West Virginia and Virginia on the East. The district comprises sixty-seven different counties; the cities of Covington, Newport, Ashland, Frankfurt, and Lexington; urban areas in and around these cities; and the country, hill areas of the Cumberland Mountains and Appalachia. The jury panel in the instant case was drawn only from the metropolitan Covington area. It was nevertheless instructed by the District Court on the "standards" of the "community" of the Eastern District of Kentucky.

It must be noted that at least half the jurors sitting in judgment on this case, although living in the Covington area, worked across the Ohio River in Cincinnati, Ohio. Covington is a city of over 60,000; Cincinnati's population exceeds one-half million. The jury was thus a group all living in one city

with one-half working in another city. This group was instructed, over Petitioners' objections, on the "community standards" of a community excluding the area where many worked and including an area where none lived.

Justice Rehnquist, in announcing the Court's decision in *Hamling, supra,* stated:

> "A juror is entitled to draw on his *own* knowledge of the views of the average person *in the community or vicinage from which he comes* for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law.
>
> * * * * *
>
> "The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge *of the community or vicinage from which he comes* in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." 418 U.S., at 104-105 (emphasis added).

To define "community" in this case by the precise political-geographic boundary of the Eastern District of Kentucky, does violence to the constitutional percepts of due process and the right to a fair trial.

Jurors who live in one city and work across the river in another city cannot arbitrarily limit their exposure to "standards" or attitudes by a line drawn and determined by the flow of a river. They are necessarily affected by the atmosphere

that pervades the city within which they work every day. The "vicinage" of the jurors that this Court has said may be drawn upon encompasses the *actual* community from which they come, not some artificial political boundary. This is especially true when a juror comes from a city of 60,000 that is really only an extension of a much larger city of one-half million with which it shares a common boundary. The necessary influence the larger city exerts upon the lesser city is inescapable. Similar situations exist anytime there are sister cities, such as Minneapolis/St. Paul; Philadelphia, Pa./Camden, N.J.; Boston/Cambridge; St. Louis, Mo./East St. Louis, Ill.; and Washington, D.C./Arlington, Va.

A community does not arbitrarily stop at a political boundary, and it is unreasonable for jurors to assess a material's social acceptability in a community when most of that community is excised from their consideration. It is surely a denial of Petitioners' rights to a fair trial and due process of law when a jury familiar with the standards of Cincinnati-Covington, judging material distributed in that area, is instructed to consider standards not of that community, but of an artificial, political one including Appalachia, hundreds of miles away.

The Court in *Miller* approved Chief Justice Warren's dissent in *Jacobellis* where he stated:

> "[W]hen the Court said in *Roth* that obscenity is to be defined by reference to 'community standards', it meant community standards – not a national standard, as it is sometimes argued. I believe that here is no provable 'national standard', and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It

> is said that such a 'community' approach may well result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. *But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals."* 378 U.S. at 200-201 (emphasis added).

This Court in *Miller* rejected "national" standards as unascertainable, unworkable, and "an exercise in futility." The Eastern District of Kentucky is as diverse as any large region. Tastes and social acceptability may differ widely from the hills of Appalachia to the streets of Covington.

In discussing the meaning of the term "community," the Fifth Circuit Court of Appeals in *United States v. Groner,* 479 F.2d 577 (CA 5 1973), said:

> "For the trial of obscenity cases under federal law 'the community' should logically embrace that area from which the jury is drawn and selected. According to the Jury Act federal juries are generally drawn from a division within a district or from the district at large. Depending upon the population involved these districts vary greatly in geographical area. In a few cases a district is as large as a state; but in metropolitan areas the boundaries of a district may be comparatively small, though in such districts the population is varied and large. It does not seem reasonable or sensible to require a jury in federal criminal obscenity cases drawn from a single district or division to assess the thinking of the average person of the community, to consider the common

> conscience of the community, or the present-day standards of the community if the work 'community' is to include all of the people within the boundaries of this vast Nation North, South, East and West." 479 F.2d, at 583.

Similarly, when there is as large and diverse an area as the Eastern District of Kentucky, it becomes impossible for a jury to assess the standards of the entire district.

Hamling held that jurors may draw upon their own vicinage for experiences and knowledge upon which to base a decision of whether or not materials contravene local community standards. The Court below, however, refused to admit and give instructions concerning the local community standards of Cincinnati-Covington, and even the street upon which the theatre itself was located. Thus the community directly concerned with this case was not the focus of the instructions but rather a community that is best termed abstract, unworkable, and unascertainable. The only evidence the Court below admitted concerning Cincinnati was the movement of some of the Appellants there and possibly the presence of film there. Evidence as to the standards of Cincinnati-Covington was not admitted, and even if it had been admitted, it was not instructed upon by the Court. It must be remembered that a number of the jurors in this case worked across the river in Cincinnati and could not escape its influence upon their decisions. They were forced, however, to disregard such experiences, to disregard the vicinage from which they came, a concept upheld in *Hamling,* and told by the Court to use standards for which they were most likely unfamiliar.

Because the jury here was drawn from the Covington area, because half of them worked in Cincinnati, because the local

community referred to by the trial court excised all references to Cincinnati-Covington as a community, and because the trial court instructed the jury regarding the "standards" of the entire Eastern District of Kentucky, rather than the actual community or vicinage, Petitioners were denied a fair trial and due process of law.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

ROBERT EUGENE SMITH, Esquire
GILBERT H. DEITCH, Esquire
2005 One Hundred Colony Square
Atlanta, Georgia 30361
(404) 892-8890

Attorneys for Petitioners.

Of Counsel:

ANDREW B. DENNISON, Esquire
216 East 9th Street
Cincinnati, Ohio 45202
(513) 621-6151

APPENDIX A

**UNITED STATES of America,
Plaintiff-Appellee,
v.
Stanley MARKS, d/b/a Cinema X
Theatre, Defendant-Appellant.**

**UNITED STATES of America,
Plaintiff-Appellee,
v.
AMERICAN AMUSEMENT COMPANY, INC.,
Defendant-Appellant.**

**UNITED STATES of America,
Plaintiff-Appellee,
v.
Guy WEIR, Defendant-Appellant.**

**UNITED STATES of America,
Plaintiff-Appellee,
v.
Harry MOHNEY, Defendant-Appellant.**

**UNITED STATES of America,
Plaintiff-Appellee,
v.
AMERICAN NEWS COMPANY, INC.,
a/k/a American News Distributing
Co., Defendant-Appellant.**

Nos. 74-1531 to 74-1535.

**United States Court of Appeals,
Sixth Circuit.**

July 30, 1975.

Before WEICK, McCREE and ENGEL, Circuit Judges.

WEICK, Circuit Judge.

The defendants were charged in a nine-count indictment with eight substantive offenses of transporting in interstate commerce from various states to Newport, Kentucky, copies of obscene, lewd, lascivious and filthy films and film previews for the purpose of sale and distribution, in violation of 18 U.S.C. § 1465, and in the ninth count with a conspiracy in violation of 18 U.S.C. § 371.

All of the defendants were acquitted by the jury of the charge contained in Count 8 of the indictment, which count involved the film preview "Let Me Count the Lays." American News Company, Inc. was convicted only on the conspiracy Count 9. The remaining defendants were convicted on Counts 1 through 7 and Count 9. The individual defendants were each given concurrent sentences of three months' imprisonment and fined $2,000. American News was fined $5,000, and American Amusement was fined $7,000.

Each alleged obscene film or film preview was made the subject of a separate count in the indictment. The films involved in Counts 1 through 7 of the indictment were "Deep Throat" and "Swing High". The film previews were "Doctor's Disciples," "Teenage Cowgirls," "Black On White," "Memoirs of a Madam," and "A Few Bucks More."

The films had been viewed at Cinema X Theatre in Newport, Kentucky, by Special Agent Glossup of the FBI, another agent, and an Assistant United States Attorney, who paid for their admissions to the theatre. A few days later Special Agent Aebly viewed the film "Swing High" and the film preview "Doctor's Disciples" at the theatre.

Special Agent Glossup had made an investigation and learned that Cinema X was regularly receiving shipments in interstate commerce and had received interstate shipments shortly prior to the showing of the film and previews at the

theatre. He also found out that the film "Deep Throat" had been made outside of Kentucky.

Special Agents Glossup and Aebly then executed separate Affidavits for a Search Warrant, to search the premises of Cinema X Theatre in Newport. The affidavit of Special Agent Glossup set forth in great detail the facts as to what each film or film preview depicted and exhibited, and also the narration.[1]

---

[1] A composite of all of the films and film previews depict acts of cunnilingus, fellatio, onanism, sodomy, male ejaculation, sexual intercourse and group sex.

Deep Throat: portrayed a young female in quest of sexual fulfillment, which had eluded her because her clitoris was lodged in her throat. Scenes depicted males and females engaged in cunnilingus, sodomy, group sexual encounters where sodomy and fellatio were simultaneously practiced, sexual intercourse, and male ejaculation.

Swing High: depicted a group sexual encounter where cunnilingus, fellatio, sexual intercourse, masturbation, onanism, and sodomy were practiced.

Previews

Doctor's Disciples: depicted acts of onanism, sexual intercourse, and male ejaculation.

Teenage Cowgirls: two very young females are shown in close up scenes of fellatio and sexual intercourse.

Black on White: depicted various acts of fellatio, cunnilingus and sexual intercourse by a white male with a black female and a black male with a white female.

Memoirs of a Madam: portrayed three couples on a bed in various stages of nudity engaging in oral and genital acts, and with one female masturbating with a vibrator. This preview also depicted a black male and white female engaged in sexual intercourse.

A Few Bucks More: portrayed fellatio, and male enjaculation.

The affidavit of Glossup also stated that the films had been transported in interstate commerce.

The affidavit of Special Agent Aebly referred to Glossup's "companion" affidavit and stated that the films which he viewed were a violation of 18 U.S.C. § 1465 and provided an objective narrative of "Swing High" and "Doctor's Disciples."

The Government applied to a United States Magistrate for a search warrant based on the two affidavits and requested that the Magistrate set the time for a hearing on the issue of obscenity *vel non*. The Government also applied to the District Court for a temporary restraining order to prevent the removal or destruction of the films pending the obscenity hearing before the Magistrate, which application was granted. Copies of the restraining order and notice of hearing before the Magistrate were served on the individual then in charge of Cinema X.

A motion to dismiss was filed by appellant, Stanley Marks, doing business as Cinema X Theatre, and it was denied by the District Judge.

The Magistrate conducted a hearing on the issue of obscenity. Special Agents Glossup and Aebly testified and were cross-examined and their affidavits were admitted in evidence. Near the conclusion of the hearing Mr. Marks asked for a continuance to present expert testimony on the issue of obscenity, which request was denied, and the search warrant was issued. The record does not reveal any effort by the appellant Marks to present the films to the Magistrate to aid him in making his determination of obscenity.

A search of the premises of Cinema X Theatre was conducted. The films and film previews which are the subjects of the indictment were seized along with advertising displays and time schedules.

A motion to suppress was made and was denied.

I.

[1] In our opinion there was probable cause for the Magistrate to issue the search warrant. The action of the Magistrate in issuing the search warrant was supported by the affidavits of Special Agents Glossup and Aebly. These affidavits clearly indicated that the films involved hard core pornography of the worst sort.

The showing of the film was not protected by the First Amendment. It was not required that the Magistrate view the films. He could accept the sworn statements of the two Special Agents which graphically portrayed the films as well as the sound features. The Special Agents were also examined and cross-examined at the hearing.

If Mr. Marks desired to offer expert testimony on the obscenity issue he should have presented his witnesses at the hearing and not asked for a continuance, which the Magistrate was not bound to grant. We find no abuse of discretion on the part of the Magistrate.

[2] Nor do we find any error on the part of the District Court in granting a temporary restraining order without notice to appellants, which injunction was granted for the sole purpose of preventing the destruction or removal of the films and thereby preserving the status quo. *United States v. Little Beaver Theatre, Inc.*, 324 F. Supp. 120 (S.D. Fla. 1971).

[3] The affidavit of Agent Glossup also was sufficient to establish that the films had been transported in interstate commerce.

The District Court was correct in denying the motion to suppress.

II

[4] In our opinion the provisions of 18 U.S.C. § 1465 are not vague nor overbroad. The statute is constitutional. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). *United States v. 12 200-ft. Reels of Super 8MM Film*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973); *Smith v. United States*, 505 F.2d 824 (6th Cir. 1974); *United States v. Hill*, 500 F.2d 733 (5th Cir. 1974); *United States v. Manarite*, 448 F.2d 583 (2nd Cir. 1971), *cert. denied*, 404 U.S. 947, 92 S.Ct. 281, 30 L.Ed. 2d 264 (1971).

III

In arguing that there was no proof of conspiracy, the appellants assert that it was necessary to prove that they had actual knowledge that the films were obscene under the law. We disagree.

[5] The scienter required to support their conviction, however, was not that they actually knew that the films were obscene under legal standards, but only that they knew the general nature and character of the films. *Rosen v. United States*, 161 U.S. 29, 41, 42, 16 S. Ct. 434, 40 L.Ed. 606 (1896). This was made explicit in *United States v. Hamling*, 481 F.2d 307 (9th Cir. 1973), *aff'd*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); *United States v. Mishkin*, 317 F.2d 634, 637 (2d Cir. 1963), *cert. denied*, 375 U.S. 827, 84 S. Ct. 71, 11 L.Ed.2d 60 (1963).

[6] It was not necessary that the films be judicially determined to be obscene before any conspiracy to violate Section 1465 could exist.

[7] In our opinion there was substantial evidence to support the conviction of the appellants on the conspiracy count.

IV

[8] The use of a multi-count indictment was not unconstitutional, and no case cited by appellants so holds. Each count of the indictment charges a separate and distinct offense. The criteria to establish each offense is different.

What appellants are really complaining about is that the proof did not show that each film or film preview was shipped in interstate commerce on a day certain. The indictment alleged that "Deep Throat" was shipped between the dates of January 24 and January 31, 1973; that "Swing High" was shipped between February 1 and February 27, 1973; that the remaining shipments were made between January 15 and February 27, 1973. The exact dates of these shipments could not very well be proven by the Government because Cinema X had destroyed its records of the shipments.

[9] In our opinion the transportation of each film or or film preview constituted a separate offense. *United States v. Bennett*, 383 F.2d 398 (6th Cir. 1967). See also *Sanders v. United States*, 441 F.2d 412 (10th Cir. 1971).

The proof established that Cinema X was receiving shipments from different states.

There was some evidence that "Deep Throat" was filmed in New York and Florida.

The conspiracy would also constitute an offense separate from the substantive offenses.

In any event, there could be no prejudice to the appellants because the sentences on all the counts were made concurrent.

V

[10] The District Court did not err in denying the motion of the defendants to voir dire the jury to determine whether they heard all of the film dialogue of "Deep Throat" shown in the courtroom.

Their first motion was addressed to whether the jury could hear and "understand" the dialogue, but later defendants dropped the "understand" part.

The District Court said:

THE COURT: Very well. I overrule your motion. I heard the dialogue, I saw the picture. I can't say I understood the dialogue in its greatest detail, but I understood it well enough to get the sense of the picture as these experts all of them the defendant's, outlined it. [Tr. 643]

The Court further stated:

THE COURT: Well now, I think to ask them if they understood–

MR. DENNISON: That is could they hear it.

THE COURT: –and heard the complete dialgoue is an extreme situation. I'm not sure there is any trial in any case that the jury has to go on record as saying, "I understand completely everything that has gone on in this case."

MR. DENNISON: No, Your Honor, I didn't mean to confuse the Court by the term "understand". Rather what I meant to say, if I did use the term "understand" was that they could hear it, was it audible to them.

THE COURT: Well, I'll have to exercise my own conclusions as to if it was addressing itself to the jury as it did to me and I could see it, hear it, and understand it and I must assume that the jury could. I'm not saying it was the most perfect showing, not the same as you would get on a large screen, or that the accoustics in this courtroom are the same as they are in a theater, but I think it was sufficient to understand it. In addition to that it was explained in detail by the expert witnesses. I think the jury has had ample disclosure of the film's plot, its purpose, and I will overrule your motion. [Tr. 644-645]

It appears from the foregoing that the District Judge was able to see, hear, as well as understand the "Deep Throat" dialogue. In addition, the dialogue was discussed in the testimony of the defendants' experts, so that the jury knew all about it.

It was not contended that the jurors did not get a good view of the pictures shown on the film which portrayed obscenity at its worst.

Nor did the defendants point out what portions, if any, of the sound track of the film were inaudible, or offer to provide one of their better films.

No issue was raised as to the viewing of the film previews.

This issue was addressed to the sound discretion of the District Court which saw the film and heard the dialogue.

We find no abuse of discretion.

VI

Appellants contend that they were deprived of their right to a fair trial and due process rights when the District Judge instructed the jury that the contemporary community standards would be comprised of the Eastern District of Kentucky, as opposed to the national standard, or even the Cincinnati-Covington area. Appellants assert that "community" should not have been defined by the precise political-geographic boundary of the Eastern District of Kentucky. We disagree.

[11] The jury was composed entirely of residents of the Eastern District of Kentucky. The Cinema X Theatre was located in Newport, Kentucky, a city within the Eastern District. In addition, the District Judge permitted testimony with respect to the community standards of the Cincinnati area, although Cincinnati is in a different state.

In *Miller v. California, supra,* 413 U.S. at 33-34, 93 S.Ct. 2607, the entire state of California was found a proper focal point for determining community standards.

In *Hamling v. United States,* 418 U.S. 87, 94 S. Ct. 2887, 41 L.Ed.2d 590 (decided June 24, 1974), the Supreme Court defined a "community" for federal obscenity cases as follows:

Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that "'community" upon which the jurors would draw. But this is not to say that a District Court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jury. . . .
(*Id.* at 105, 94 S.Ct. at 2901).

See *Jenkins v. Georgia,* 418 U.S. 153, 94 S. Ct. 2750, 41 L.Ed.2d 642 (1974).

We conclude that the District Judge could properly limit the community standard to the area encompassed by the Eastern District of Kentucky.

VII

Finally, it is contended that the District Court erred in its instructions to the jury by applying the standards in the most recent decisions of the Supreme Court in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), and companion cases.[2]

Appellants assert that since the offenses of which they were convicted were committed prior to the *Miller* and companion decisions, they were entitled to the protection of the *Roth-Memoirs* definition of obscenity. *Roth v. United States,* 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957); *Memoirs v. Massachusetts,* 383 U.S. 413, 86 S. Ct. 975, 16 L.Ed.2d 1 (1966). They contend that the *Miller* formulation as to obscenity as applied to their pre-*Miller* offenses constituted an *ex post facto* law and violated their constitutional rights to due process of law and a fair trial.

Roth held specifically that obscene material is not protected by the First Amendment. *Id.* 354 U.S. 485, 77 S.

---

[2] *Miller v. California,* 1973, 413 U.S. 15, 27, 93 S.Ct. 2607, 2616, 37 L.Ed.2d 419, 432; *Paris Adult Theatre I v. Slaton,* 1973, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446; *United States v. Orito,* 1973, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513; *Kaplan v. California,* 1973, 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492; *United States v. 12 200-Ft. Reels of Super 8 mm Films,* 1973, 413 U.S. 123, 93 S. Ct. 2665, 37 L.Ed.2d 500.

Ct. 1304. This was also the theme of *Miller* and companion cases.

The *Roth-Memoirs* formulation provided that in order to be obscene.–

(a) The dominant theme of the material taken as a whole appeals to a prurient interest in sex;

(b) The material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters;

(c) The material is utterly without redeeming social value.

The *Miller* formula changed only (c) in the *Roth-Memoirs* definition so that it would read as follows:

(c) Whether the work taken as a whole lacks serious literary, artistic, political or scientific value.

Chief Justice Burger, who wrote the opinion for the majority in *Miller*, stated the reasons for the change in the definition. In the first place, the *Roth-Memoirs* definition (c) had never been approved by a plurality of more than three Justices at any one time. It imposed a burden virtually impossible to discharge under our criminal standards of proof.

Mr. Justice Harlan, in his dissent in *Memoirs*, wondered whether formulation (c) had any meaning at all. *Id.*, 383 U.S. 459, 86 S.Ct. 975.

It is plain to us that the material in the present case was obscene, irrespective of which standards are applied.

Examples of obscene matter were given in *Miller*:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. (*Id.*, 413 U.S. 25, 93 S.Ct. 2615)

The brochures found to be obscene in *Miller* "consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals, often prominently displayed." (*Id.* 18, 93 S.Ct. 2612).

Appellants assert–

. . . [P]rior to *Miller* only a modicum of social value need be shown for a film to be non-obscene.[3]

We disagree.

"Modicum" is defined in Webster's New American Dictionary of the American Language, College Edition, as "a small amount in portion, bit."

If this were the law then an obscene film could be insulated and made nonobscene by a narrative which quoted only a single sentence from the Bible.

Under the *Roth-Memoirs* standards it was always necessary for the Government to prove that the *dominant* theme (not *modicum)* appealed to the prurient interest in sex in order to be obscene.

---

[3] Chief Justice Burger, in *Miller*, was of the view that it was easier to apply the relaxed standards in *Miller*, rather than the more stringent standards of *Roth-Memoirs*.

As well stated by Chief Justice Warren, in his concurring opinion in *Roth*, 354 U.S. at 496, 77 S. Ct. at 1315:

They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. . . . That is all that these cases present to us, and that is all we need to decide.

Libelous material does not become nonlibelous merely because it is accompanied by a modicum of nonlibelous matter.

[12] The defendants were entitled to any benefit they could derive from *Miller* and companion cases. *Hamling v. United States, supra; Jenkins v. Georgia, supra.*

There can be no question but that the material in "Deep Throat" was hard core pornography. It was the type referred to by Mr. Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184, at 197, 84 S.Ct. 1676, at 1683, 12 L.Ed.2d 793 (1964), when he stated we "know it when [we] see it." The jury saw it when it reviewed the film and had no difficulty in assessing its character.

The case was tried before one of our ablest District Judges, the late Mac Swinford, who applied the *Miller* formulation. We believe he was required to do so by the specific terms of the remand in *Miller*, which was "for further proceedings not inconsistent with First Amendment standards as established by this opinion. See *United States v. 12 200-Ft. Reels of Film*, post [413 U.S.] 130 n.7 [93 S.Ct. 2665.]" Note 7 reads:

. . .We are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of "hard core" sexual conduct given as examples in *Miller v. California, supra* [413 U.S.] at 25 [93 S.Ct. 2607]. See *United States v. 37 Photographs, supra* [402 U.S. (363)] at 369-374 [91 S.Ct. [1400] at 1404-1407, 28 L.Ed.2d 822] (White, J.)

In *United States v. 12 200-Ft. Reels of Super 8MM Film*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973), decided with *Miller*, the Court said:

We have today arrived at standards for testing the constitutionality of state legislation regulating obscenity. See *Miller v. California, supra* [413 U.S.] at 23-25, 93 S.Ct. [2607], at 2614-2615. These standards are applicable to federal legislation. *Id.*, at 129-130, 93 S.Ct. at 2671.

This issue, we think, is governed by the decision of the Supreme Court in *Hamling v. United States, supra.* In that case the District Court, *pre-Miller*, instructed the jury that the case was governed by the national standards for obscenity. On appeal, appellants contended that they were entitled to the benefit of *Miller*, namely that contemporary community standards should have been applied. In *Hamling* the Court held, 418 U.S. at 108, 94 S.Ct. at 2903:

. . .[W]e hold that reversal is required only where there is a probability that the excision of the references to the "country as a whole" in the instruction dealing with community standards would have materially affected the deliberations of the jury. [Citing authority]. . . Our examination of the record convinces us that such a probability does not exist in this case.

[13] Our examination of the record in the present appeals convinces us that such a probability does not exist here, for it is clear that under either *Roth-Memoirs* or *Miller* standards the material was obscene.

The Court further stated in *Hamling* at 115, 94 S.Ct. at 2906:

Nor do we find merit in petitioners' contention that cases such as *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), require reversal of

their convictions. The Court in *Bouie* held that since the crime for which the petitioners there stood convicted was "not enumerated in the statute" at the time of their conduct, their conviction could not be sustained. *Id.*, at 363, 84 S.Ct. [1697], at 1707. The Court noted that "a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." 378 U.S. at 352, 84 S.Ct. [1697], at 1702. But the enumeration of specific categories of material in *Miller* which might be found obscene did not purport to make criminal, for the purpose of 18 U.S.C. § 1461, conduct which had not previously been thought criminal. That requirement instead added a "clarifying gloss" to the prior construction and therefore made the meaning of the federal statute involved here "more definite" in its application to federal obscenity prosecutions. *Bouie v. City of Columbia*, 378 U.S. at 353, 84 S.Ct. [1697], at 1702. Judged by both the judicial construction of § 1461 prior to *Miller*, and by the construction of that section which we adopt today in the light of *Miller*, petitioners' claims of vagueness and lack of fair notice as to the proscription of the material which they were distributing must fail.

Defendants rely on *United States v. Palladino*, 490 F.2d 499 (1st Cir. 1974). The judgment in the first appeal in *Palladino* had been vacated and remanded by the Supreme Court to the Court of Appeals for consideration in the light of *Miller* and companion cases.

On the remand a divided Court of Appeals held that national and obscenity standards under *Roth-Memoirs* were to be applied rather than the community and obscenity standards under *Miller*. Senior Circuit Judge Bailey Aldrich dissented, stating in part:

I am not happy about the court's opinion. In the first place, the Court majority in *Miller* evinced no compunction about convicting Miller by a definition of obscenity that was

not in effect at the time of his publication. Having in mind the mass of uncertainties in this field, see my prior dissent, I can see why the Court felt that the First Amendment did not bar an adverse change in the rules. If not for Miller, why for Palladino? This case does not fit the normal situation where the courts have had to determine whether constitutional principals are to be applied retroactively. With all respect, I do find the Fifth Circuit's decision in *United States v. Thevis* [484 F.2d 1149] persuasive. The Court sent this case back to determine "in light of *Miller* . . ."*

*The Fifth Circuit's First Amendment ruling was a bare assertion, and got off, I suggest, somewhat on the wront foot by misquoting the mandate as remanding for further proceedings "not inconsistent with" *Miller*, etc., rather than "in light of." (490 F.2d at 504)

and I would apply the *Miller* definition, not *Roth's* or *Memoirs'*.

By the same token, we are not required by past decisions to give the defendant the benefit of national standards. Today, as a modest observer, I believe that national standards is a many-headed hydra, only ingenuously to be spoken of as within the competence of any expert short of Hercules, and beyond the mastery of any juror.

We agree with Judge Aldrich's dissent. We note that in *Hamling, supra, Palladino* was rejected by the Supreme Court in its holding that national rather than community standards should be applied.

In *United States v. Wasserman*, 504 F.2d 1012 (5th Cir. 1974), the Court reversed because *Miller* standards were applied, citing *Palladino*, its previous decision in *United States v. Thevis*, 484 F.2d 1149 (5th Cir. 1973), *cert. denied* 418 U.S. 932, 94 S.Ct. 3222, 41 L.Ed.2d 1170 (1974), and *United*

States v. Jacobs, 513 F.2d 564 (9th Cir. 1974) as authority. Jacobs cited the Fifth Circuit decision in *Thevis*.

Thevis was pending on appeal when *Miller* and companion cases were decided. The Court of Appeals considered obscene standards under both *Memoirs* and *Miller*, and held that any count of the indictment based on a magazine which is not obscene under both standards would be dismissed. We do not regard *Thevis* as applicable.

We decline to follow *Wasserman* and *Jacobs* for the same reason that we do not follow *Palladino*. The time for filing in the Supreme Court petitions for certiorari, has not expired in either of these two cases.

We are of the opinion that under either *Memoirs* or *Miller* standards the films in the present appeals were obscene.

In our opinion the verdicts of the jury were supported by substantial evidence, and no prejudicial error intervened at the trial.

Affirmed.

McCREE, Circuit Judge (dissenting).

I respectfully dissent. Appellants contend that their convictions under 18 U.S.C. §§ 371, 1465 should be reversed because the district judge erroneously gave a *Miller* instruction. They contend that the issue whether the films are obscene should have been decided under the *Roth-Memoirs* standard because the films were seized before the Supreme Court decided *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Three circuits have considered the same issue and have determined that *Miller* expanded the field of potential criminal liability and that it would be unfair to hold defendants' conduct criminal by a retroactive application of *Miller*. See *United States v. Jacobs*, 513 F.2d 564 (9th Cir. 1974), *United States v. Sherpix*, 512 F.2d 1361 (D.C.Cir. 1975) (cases holding that

Miller instruction for pre-*Miller* conduct was a denial of due process), and *United States v. Wasserman*, 504 F.2d 1012 (5th Cir. 1974) (retro-active application of *Miller* is inappropriate without substantial justification outweighing *ex post facto* considerations).

The majority opinion holds that the films in question are obscene under either the *Roth-Memoirs* formula or the *Miller* formula and it accordingly does not reach the issue whether *Miller* is an appropriate standard. If the jury had been given both the *Miller* and the *Roth-Memoirs* instructions, we could view the films and determine whether the jury's verdict that they were obscene was permissible. *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974). However, since the jury was not given the *Roth-Memoirs* instruction ("utterly without redeeming social value"), to speculate on our view [1] of the films how the jury might have decided the case if it had been given the proper instructions would deny the right of trial by jury. I agree with the opinions rendered by unanimous panels in the District of Columbia, the Fifth, and the Ninth Circuits holding the retroactive application of *Miller* to be improper. I would reverse the convictions.

---

[1] Although the challenged films were lodged with the court as exhibits, the majority of the panel decided that an examination of them was not necessary for decision. Accordingly, the films were not seen by any member of the panel.

APPENDIX B

Constitutional and Statutory Provisions.

1. The pertinent provisions of the First Amendment are:

   "Congress shall make no law . . . abridging the freedom of speech, or of the press. . ."

2. The pertinent provisions of the Fifth Amendment are:

   "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

JOINT APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-708

STANLEY MARKS, HARRY MOHNEY,
GUY WEIR, AMERICAN AMUSEMENT CO., INC.,
and AMERICAN NEWS CO., INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 13, 1975
CERTIORARI GRANTED MARCH 1, 1976

INDEX

JOINT APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-708

STANLEY MARKS, HARRY MOHNEY,
GUY WEIR, AMERICAN AMUSEMENT CO., INC.,
and AMERICAN NEWS CO., INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 13, 1975
CERTIORARI GRANTED MARCH 1, 1976

DOCKET ENTRIES
(Filed July 26, 1974)

1. Motion for a Temporary Restraining Order Without Notice 2-26-73.

2. Temporary Restraining Order Without Notice 2-26-73.

3. Copy of Temporary Restraining Order Without Notice with return 2-26-73.

4. Motion to Dismiss 2-28-73.

5. Memorandum of Points and Authorities to Show Cause Why a Search Warrant Should Not Issue for the Seizure of Films 2-28-73.

6. Order: Motion to Dismiss overruled 2-28-73.

7. Order Setting Time and Place of Hearing 3-1-73.

8. Order Setting Time and Place of Hearing with return 3-1-73.

9. Copy of Order Setting Time and Place of Hearing with return 3-1-73.

10. Application for Issuance of a Search Warrant 3-1-73.

11. Affidavit for Search Warrant 3-1-73.

12. Affidavit for Search Warrant 3-1-73.

13. Magistrate's Record of Proceedings 3-1-73.

14. Search Warrant 3-1-73.

15. Notice of Appeal 3-5-73.

16. Transcript of Hearing Before the Honorable Robert C. Cetrulo 3-21-73.

17. Transcript of Court's Ruling on Defendant's Motion to Dismiss 3-30-73.

18. ORDER of U.S. Court of Appeals for the Sixth Circuit granting motion to dismiss 12-4-73.

UNITED STATES OF AMERICA 74-1531, 74-1532, 74-1533, 74-1534,
EASTERN DISTRICT OF KENTUCKY 74-1535

I, Davis T. McGarvey, Clerk for the Eastern District of Kentucky do hereby certify that the annexed and foregoing relevant documents in the case of The United States of America, plaintiff, versus Stanley Marks, dba Cinema X Theatre, defendant, Magistrate's Docket No. 3, Case No. 192 on the Covington Docket are supplements to the Criminal Case No. 11,057.

IN TESTIMONY WHEREOF, I have herewith subscribed my name and affixed the seal of the aforesaid Court at Covington, Kentucky, this 12th day of July, 1974.

Davis T. McGarvey, Clerk
By: /s/Dorothy D. Walsh, D.C.

EXHIBIT NO. 7
(Filed March 1, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON

UNITED STATES OF AMERICA, PLAINTIFF,	MAGISTRATE'S DOCKET NO. 3
VS:	CASE NO. 192
STANLEY MARKS d/b/a CINEMA X THEATRE, 716 Monmouth Street, Newport, Kentucky DEFENDANT.	ORDER SETTING TIME AND PLACE OF HEARING

Now to-wit on this 26th day of February, 1973. this matter comes before the undersigned upon the application of the United States of America for the issuance of a search warrant for the premises described as Cinema X Theatre, 716 Monmouth Street, Newport, Kentucky, to search for certain films, previews, containers and documents described in the affidavit attached to said application.

Before a determination is made as to whether or not probable cause is established for the issuing of said search warrant the defendant, Stanley Marks d/b/a Cinema X. Theatre, should be given an opportunity to appear at an adversary hearing at which a determination will be made as to whether or not there is probable cause to find said films obscene.

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that said adversary hearing shall be held at the Office of the United States Magistrate at Greenup Street,

Covington, Kentucky, on the 27th day of February, 1973, at 2 P.M., EST.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that said notice of said hearing, which shall be an adversary hearing, shall be served on the defendant by delivering a copy of this Order to the defendant at least twelve hours prior to said hearing.

IT IS FURTHER ORDERED that this Order may be served by any special agent in the Federal Bureau of Investigation.

DATED this 26th day of February, 1973.

/s/ROBERT C. CETRULO
UNITED STATES MAGISTRATE
EASTERN DISTRICT OF
KENTUCKY

EXHIBIT NO. 8

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON

UNITED STATES OF AMERICA, PLAINTIFF,	:	MAGISTRATE'S DOCKET NO. 3
VS:	:	
	:	CASE NO. 192
STANLEY MARKS d/b/a CINEMA X THEATRE, 716 Monmouth Street, Newport, Kentucky DEFENDANT.	:	ORDER SETTING TIME AND PLACE OF HEARING

Now to-wit on this 26th day of February, 1973. this matter comes before the undersigned upon the application of the United States of America for the issuance of a search warrant for the premises described as Cinema X Theatre, 716 Monmouth Street, Newport, Kentucky, to search for certain films, previews, containers and documents described in the affidavit attached to said application.

Before a determination is made as to whether or not probable cause is established for the issuing of said search warrant the defendant, Stanley Marks d/b/a Cinema X. Theatre, should be given an opportunity to appear at an adversary hearing at which a determination will be made as to whether or not there is probable cause to find said films obscene.

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that said adversary hearing shall be held at the Office of the United States Magistrate at Greenup Street,

Covington, Kentucky, on the 27th day of February, 1973, at 2 P.M., EST.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that said notice of said hearing, which shall be an adversary hearing, shall be served on the defendant by delivering a copy of this Order to the defendant at least twelve hours prior to said hearing.

IT IS FURTHER ORDERED that this Order may be served by any special agent in the Federal Bureau of Investigation.

DATED this 26th day of February, 1973.

/s/ROBERT C. CETRULO
UNITED STATES MAGISTRATE
EASTERN DISTRICT OF
KENTUCKY

RETURN

I received the attached notice of hearing February 26, 1973 and have executed it as follows:

On February 26, 1973 at 1:51 p.m. EST, I served a copy of the said notice on Jay Trimble, Cashier, Cinema X Theater, 716 Monmouth, Newport Kentucky at Cinema X Theater, 716 Monmouth, Newport, Kentucky who was then identified to me as the person in charge.

/s/Vernon R. Glossup
Special Agent, FBI

EXHIBIT NO. 9

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON

UNITED STATES OF AMERICA, PLAINTIFF,	:	MAGISTRATE'S DOCKET NO. 3
VS:	:	CASE NO. 192
STANLEY MARKS d/b/a CINEMA X THEATRE, 716 Monmouth Street, Newport, Kentucky DEFENDANT.	:	ORDER SETTING TIME AND PLACE OF HEARING

Now to-wit on this 26th day of February, 1973. this matter comes before the undersigned upon the application of the United States of America for the issuance of a search warrant for the premises described as Cinema X Theatre, 716 Monmouth Street, Newport, Kentucky, to search for certain films, previews, containers and documents described in the affidavit attached to said application.

Before a determination is made as to whether or not probable cause is established for the issuing of said search warrant the defendant, Stanley Marks d/b/a Cinema X. Theatre, should be given an opportunity to appear at an adversary hearing at which a determination will be made as to whether or not there is probable cause to find said films obscene.

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that said adversary hearing shall be held at the Office of the United States Magistrate at Greenup Street,

Covington, Kentucky, on the 27th day of February, 1973, at 2 P.M., EST.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that said notice of said hearing, which shall be an adversary hearing, shall be served on the defendant by delivering a copy of this Order to the defendant at least twelve hours prior to said hearing.

IT IS FURTHER ORDERED that this Order may be served by any special agent in the Federal Bureau of Investigation.

DATED this 26th day of February, 1973.

/s/ROBERT C. CETRULO
UNITED STATES MAGISTRATE
EASTERN DISTRICT OF
KENTUCKY

Return

I received the attached notice of Hearing on February 26, 1973 and have executed it as follows:

On February 27, 1973 at 1:20 p.m. EST, I served a copy of the said notice on STANLEY HERMAN MARKS, owner of Cinema X Theater, 716 Monmouth Street, Newport, Kentucky, at 216 East 9th Street, Cincinnati, Ohio in the presence of Attorney Andrew Dennison.

/s/Paul L. Shannon
Special Agent, FBI

/s/Louis Paul Russo
Special Agent, FBI

EXHIBIT NO. 10
(Filed March 1, 1973)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

UNITED STATES OF AMERICA Plaintiff	:	MAGISTRATE'S DOCKET NO. 3 Case NO. 192
vs.	:	
STANLEY MARKS d/b/a Cinema X Theater 716 Monmouth Street Newport, Kentucky	:	APPLICATION FOR ISSUANCE OF A SEARCH WARRANT

Comes now the United States of America and moves the Honorable Robert Cetrulo, United States Magistrate for the Eastern District of Kentucky, to issue a search warrant for the premises known as Cinema X Theater, 716 Monmouth Street, Newport, Kentucky and in support of said motion presents the affidavits of Vernon Glossup and Ron Aebly, Special Agents of the Federal Bureau of Investigation, a copy of which is attached to this motion.

Respectfully submitted,

Eugene E. Siler, Jr.
United States Attorney

By: /s/ Louis DeFalaise
Assistant United States Attorney

EXHIBIT NO. 11
(Filed March 1, 1973)

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY
COVINGTON

UNITED STATES OF AMERICA	:	Commissioner's Docket No. 3 Case No. 192
vs.	:	
STANLEY MARKS d/b/a Cinema X 716 Monmouth Street Newport, Kentucky	:	AFFIDAVIT FOR SEARCH WARRANT

BEFORE Robert Cetrulo, Covington, Kentucky

The undersigned being duly sworn deposes and says:

That he is positive that on the premises known as

Cinema X Theater
716 Monmouth Street
Newport, Kentucky

Campbell County in the Eastern District of Kentucky there is now being concealed certain property, namely

1. One movie film entitled "Swing High".
2. A preview film clip entitled "Doctors Disciples".

which are obscene, lewd, lascivious and filthy and were knowingly transported in interstate commerce for the purpose of sale and distribution in violation of Title 18, Section 1465, United States Code.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: The affiant has been a Special Agent of the Federal Bureau of Investigation for 2 years.

On the afternoon of Friday, February 23, 1973, the affiant personally entered the premises known as Cinema X Theater, 716 Monmouth Street, Newport, Kentucky paying the admission price of $5.00. While ther in addition to the film "Deep Throat" and previews listed in the companion affidavit which the affiant has read, there was shown a movie of approximately one hour, entitled "Swing High" and a brief preview entitled "Doekors Disciple". The affiant observed identical scenes to those described in the affidavit of Special Agent Glossup during the showing of the movie "Deep Throat" as well as various previews listed in Special Agent Glossups affidavit.

The movie "Swing High" opened with a group scene of three naked males and three naked females and one fully dressed female. Two of the naked females were kissing and fondling each other breasts.

The seven participants then decided to pull slips of papers from a cloth has on which would be written various sexual activities to perform. They then performed on the screen with close up of their various sexual organs certain acts of cunnilingus, fellation, sexual intercourse, masterbation, oranism, and sodomy. These acts continued for approximately one half hour at which time they all retired to the bath room and took showers. After showering they switched mates and began performing the same acts again. One male layed on his back and a female in the superior position performed sexual intercourse while another female with dark hair kissed his testicles and rubbed the other female breast.

Two other girls licked the penis of another male like an ice cream cone. The two girls would lick from the bottom to the top of the penis until the male reached his climax interspaced

their licking by French kissing each other with strands of semen between their mouths.

The girl previously fully dressed performed fellation on another male until he ejaculated in her mouth and semen could be seen in the corners of her mouth.

In another scene a male and female couple performed coitus inter mammary until he ejaculated. The semen sprayed her nose, mouth, and face. She then fellated him.

In another scene the female who had been originally clad lays the top part of her body in a cushioned chair and a male sits on top of the chair and she strokes his penis back and forth with her right hand, while another male kisses and licks her vagina. She then tells the second male to eat her slowly which he did.

In another scene a male and female are having intercourse in the female superior position while he massages her right breast while another female kisses and fondles her other breast.

There are many similar scenes.

The preview of "Doctors Disciples" showed on screeen scenes of Onanism, intercourse, and male ejaculation.

The affiant observed some fifty other patrons in the theater.

/s/ Ronald F. Selby
Special Agent, FBI

Sworn to before me, and subscribed in my presence, 26 Feb., 1973

/s/Robert C. Cetrulo,
United States
Commissioner.

EXHIBIT NO. 12
(Filed March 1, 1973)

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY
COVINGTON

UNITED STATES OF AMERICA	:	Magistrate's Docket No. 3
vs.	:	
	:	Case No. 192
STANLEY MARKS	:	
dba Cinema X	:	
716 Monmouth Street	:	AFFIDAVIT FOR SEARCH WARRANT
Newport, Kentucky	:	

BEFORE: Robert Cetrulo, Covington, Kentucky

The undersigned being duly sworn deposes and says:

That he is positive that on the premises known as

Cinema X Theater
716 Monmouth Street
Newport, Kentucky

Campbell County in the Eastern District of Kentucky there is now being concealed certain property, namely

1. One movie film entitled "Deep Throat", a Vanguard film directed by Jerry Gerrard, produced by Lou Perry.
2. One movie film entitled "Carnal Cure" produced by Emilo Portici.
3. One set of previews consisting of clips of movie films variously entitled
   "Teen Age Cow Girls"
   "Black on White"

   "A Few Bucks More"
   "Memories of a Madame"
   "Let Me Count the Lays"
4. Shipping containers for all the aforesaid films, with markings and labels thereon.
5. Documents pertaining to the source, distribution, and shipping of the aforesaid films and previews.
6. Advertising pertaining to the aforesaid films and previews.

which are obscene, lewd, lascivious, and filthy and were knowingly transported in interstate commerce for the purpose of sale and distribution in violation of Title 18, Section 1465, United States Code.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

The affiant has been a Special Agent for the Federal Bureau of Investigation for 5½ years. All investigations were personally conducted regarding possible violations of statutes prohibiting interstate transportation of obscene matters, Title 18, United States Code, Section 1462.

1. On the night of Tuesday, February 20, 1973, at approximately 8 P.M., the affiant personally entered the premises known as Cinema X, 716 Monmouth Street, having paid the sum of $5.00 as the price of admission to a person appearing to be ticket agent for the aforesaid Cinema X theater, 716 Monmouth, the said person being described as follows: White male, 35 to 40 years of age, brown short hair, 5'11", 190 lbs..
This said person stated that the price of admission was $5.00, accepted the same from me, producing a ticket, tearing it in half, and dropping one-half into a box behind the counter of the front portion of the building. Before proceeding into the theater he then cautioned the affiant that there would be positively no smoking in the theater and no masturbation, using an obscene slang term of this last act.

Upon the walls behind the counter in the lobby of the theater in which the aforesaid ticket was purchased, there was a sign stating that the movie being shown advertised in the newspaper as "Deep Voice" was in fact the movie known as "Deep Throat." Subsequent to the said ticket purchase, the affiant passed through one of two red curtains entrances from the lobby end of the theater to the actual theater proper. The affiant there observed as part of the premises known as the Cinema X theater, 716 Monmouth Street, Newport, Kentucky, a viewing room approximately 50' x 150', with a seating capacity of approximately 350 and containing a regular size movie screen, with exits to the left and the right of the screen. Upon entry it was obvious that there was approximately 100 to 125 patrons of both male and female sexes observing the movie which was then in progress.

The affiant then observed in their entirety the following described films which were presented and shown in the said Cinema X theater at 716 Monmouth Street, Newport, Kentucky, described as follows:

1. A film entitled "Deep Throat," prepared by Vanguard Films, written, directed, and edited by Jerry Gerrard, and produced by Lou Perry.

Superimposed upon the screen credits was a well-dressed female actress, walked to enter a 1972 white over blue Cadillac, bearing California license tags, with large white letter titles and credits. In the background were observed palm trees, a large body of water with surf, none of such scenes, to the affiant's knowledge, are located in the Eastern District of Kentucky.

Upon completion of the credits, during which time the featured actress, Linda Lovelace drove the Cadillac through what appeared to be a large California suburban city, she was seen to enter the kitchen of a house in which an older female, approximately 35 years of age, was sitting on a table with her legs spread apart, exposed from the waist down, with a young

male appearing to be a delivery boy engaging her in cunnilingus. During this sequence, the tongue of the male was shown in close-up contact views of the female's labia major, labia minor, clitoris, and vaginal wall. During the act of cunnilingus the female requested the actress, Linda Lovelace, to hand her a cigarette, which she lighted and asked the male, "Do you mind if I smoke while you eat?" The kitchen scene faded to a view of the same older female swimming in a swimming pool. This scene showed the actress Linda Lovelace, who had viewed the earlier cunnilingus with apparent disinterest, seated alongside the pool. A mock serious discussion was then held at the pool-side between the two females concerning Linda Lovelace's disappointment with her many previous sexual experiences. The older female friend then stated that they should have a party with a large number of male guests, of whom at least one should be able to bring Ms. Lovelace to a climax.

The next scene was the arrival at the home of Ms. Lovelace and her older friend of a car containing two young males. The said males then entered the home and were greeted by the older female. They were handed sheets on which were respectively written the numbers 11 and 12, and were told not to worry they were just in time for the party and a good time would be had by all, that they should sit down and have a drink and await their turn.

The next scene was in Ms. Lovelace's bedroom. She was kneeling naked on the bed on her knees and elbows, with a naked male behind her. The camera shifted view to a shot from beneath the groins of Ms. Lovelace and her male companion. Ms. Lovelace's pubic and vaginal area filled the screen, the inside of the vagina being clearly visible due to the lack of pubic hair which had been shaved off. Above the vaginal area, the penis of the male could be observed entering and withdrawing from her rectum in the act of sodomy.

The next scene shifted out to the living room of the house where the older female was also naked and was engaged in sex

with two naked males, one of whom was either sodomizing her or entering her from the rear, and the other on whom she was practicing fellatio. In subsequent scenes, the camera shifted back and forth from the living room with the older female and Ms. Lovelace's bedroom as Ms. Lovelace engaged in a variety of sexual acts with a variety of partners, including cunnilingus on Ms. Lovelace and fellatio by her on her male partner and sexual intercourse, all of which were shown in close-up detail of the contacting human sexual organs. The climax of the fellatio scene was an on-screen ejaculation of semen by a male organ. The final scene of this segment of the film was the living room in which the latest partner of Ms. Lovelace entered and said that she was ready for another male. But no one was left who could perform a sexual act with Ms. Lovelace. It was mentioned that she had just had a total of 14 men.

The next scene presented Ms. Lovelace and her older female friend walking outside. Ms. Lovelace, in summary, stated that she still had not had a full climax as a result of the party that they had held. The older female then suggested that she go see Dr. Young. Ms. Lovelace did so and the next scene was the doctor's office.

The first observation in the doctor scene was a male dressed in medical garb who played a stock "nutty" physician character. The doctor took Linda into an examination room, which appeared to be a bedroom, for a physical examination to determine why she could not reach a climax. The doctor had her remove her underpants and called for his nurse to bring a sterilizer in which the nurse brought a small bowl, in which appeared to be a clear liquid, and into which he dipped his fingers. He then immediately proceeded to examine her vagina, spreading the labia major and labia minor with his fingers, all of which was shown close-up on the screen. The doctor remarked at this point that he could not locate her clitoris and continued his search in the vaginal area for several minutes. Upon learning that she had no clitoris, Ms. Lovelace

began to cry. The doctor then inquired what type of sexual activity gave her the greatest pleasure. She informed him that it was giving head (fellatio). The doctor then asked her to open her mouth so he could examine her oral area. During this examination he discovered that her clitoris was located as he described it, deep in her throat at the base of her throat. He then informed her that to enjoy a normal climax that she must give deep throat. He asked her if she had ever taken a penis deep into her throat, to which she replied no that she choked. He then said it is all a matter of muscle control and discipline, after which he invited her to practice on him. He then opened his pants, exposed himself, and she fellated him. In doing so, on screen she took the head of his organ in her mouth and proceeded to work it entirely into her mouth until the entire organ disappeared from sight. This scene lasted for approximately 10 minutes and was climaxed by her apparent orgastic experience which was symbolized by mammoth bells ringing, fireworks, and the launching of a Saturn rocket, each scene of which was intertwined with scenes of Ms. Lovelace's mouth, cheeks, and chin, dripping seminal fluid ejaculated from the penis which she licked and swallowed.

Upon the completion of this act, Ms. Lovelace told the doctor that she was in love with him and that they should get married. The doctor declined the marriage proposal, stating his nurse would not let him but he then invited Ms. Lovelace to become his physical therapist.

The following segments of the movie depict case histories of Dr. Young in which Ms. Lovelace, acts as a physical therapist. The opening scene of the first case history showed Dr. Young dictating the case as he performed rear entry intercourse upon his nurse. His voice then faded out and Ms. Lovelace dressed in a white nurse outfit entered a room with a middle-aged male. Ms. Lovelace, while retaining what appeared to be a slip, removed her panties and at the male's invitation, who lowered his pants, climbed upon a table and spread her legs. The male then proceeded to have intercourse with her, which

was shown on screen. During the intercourse he produced a test tube type glass or plastic container and placed this container into her vagina and proceeded to pour coca cola into it, after which they both drank its contents through long plastic tubing as the coca cola theme song played and they continued to have sexual relations.

The next scene showed Ms. Lovelace and the doctor together again, in which she was performing fellatio on him again.

The next scene showed the nurse performing fellation upon Dr. Young as he dictated a case history of an older man who was a widower who had not had sex in the two years since his wife's death. The scene faded to her entering a motel room with a fade back to the doctor who gave the details of this case history and then they faded back to the motel room in which the older male was thanking Ms. Lovelace for her services. The patient said that he would like to continue this type of therapy, to which Ms. Lovelace replied that it would be terribly expensive, and the patient replied that money was no object as he was on Medicare and he produced his Medicare card.

The next scene shows Dr. Young lying in an apparent state of collapse with a hot water bottle to his groin. Ms. Lovelace enters and after repeated refusals by the doctor finally succeeds in uncovering his sexual organs. Over the obvious reluctance of the doctor, she removes a bandage from his penis and proceeds to fellate him.

The next scene shows Dr. Young performing cunnilingus on his nurse who is dictating another case history. The nurse observes that if this patient and Ms. Lovelace were compatible they would be suitable for marriage.

The scene then faded to a bathroom in which Ms. Lovelace was perched upon the water tank of the commode, with one foot in the sink to the right and one foot on the lid of the

commode, with her vaginal area being exposed. She then took an Old Spice shaving mug and lathered her pubic area, as the Old Spice theme played in the background. She then shaved her pubic area and while doing so a masked man with a gun was observed slipping in the front door peering at Ms. Lovelace as she performed her toiletry. Ms. Lovelace upon completing her shaving and wiping off the excess foam then stood up, stretched, and said "I sure could use a big man." She then proceeded to enter the living room where the masked man demanded her money or her life. She handed him her cash and told him to do anything to her but not to hurt her. The masked man then said I am going to rape you, I have a gun. She then said "O.K., just don't hurt me." He then lowered his gun, pulled down his mask, and complained that she wasn't doing it right, that he had a gun and she was supposed to be scared and afraid for her life. She apologized and said it was because he was so masterful but that if he would try it again she would do better. After some further discussion, she urged that they go to bed because he made her hot. She said that she would do anything for him. He then urged her to marry him. She refused and upon his inquiry said, I can't because "the man I marry must have a 9" cock." He began to complain bitterly about his many failures in life but that he understood and that he was only 4" from happiness. Ms. Lovelace then urged him to call Dr. Young to see if a silicone injection or some other surgical procedure would help. The male was observed calling on the telephone and apparently having a conversation with Dr. Young. At the end of the conversation the male hung up and said that Dr. Young would help him, that he could cut it down and make it any size she wanted. He then exposed himself. She then eagerly seized his organ and performed fellatio which was again climaxed with the mammoth bells ringing, firewords, and launching of a Saturn rocket and each scene of which was intertwined with scenes of her mouth, cheeks and chin smeared, seminal fluid seen ejaculating from the penis, and also the licking and swallowing of this fluid.

This feature ended.

2. A movie entitled "Carnal Cure", produced Emilo Portici. The first scene in this movie was what appeared to be a doctor's office. The doctor entered and went into his office. A young lady then entered and asked to see the doctor. The nurse sent her into the inner office. The girl complained to the doctor that she had a cuckoo which came out of her periodically. The doctor inquired from whence the cuckoo came. She replied by indicating her vagina. The doctor had her remove her pants, hike her skirts, and sit upon his desk for the examination. A close-up of the exposed sex organ was then shown as the doctor used his fingers to spread the labia major and minor, and touch the inner vaginal tract, including her clitoris. During this examination, the doctor and the young lady carried on a conversation about the periodic appearance of the alleged cuckoo. The doctor stated that he could not find any evidence of a foreign body, but stated that perhaps he could stimulate it out. Then on screen in close ups he proceeded to perform cunnilingus, applying his lips and tongue to the whole vagina area, but particularly the clitoris and labia majors and minors. This treatment produced no results except what appeared to be an orgiastic experience by the female. The doctor then had the girl lie back on the desk after she divested herself of her clothing and then producing his erect organ proceeded to have intercourse with her in which there were many close ups of the vagina being entered by the penis.

During these acts performed by the doctor there were fade-outs to the outer office during which three separate males entered the office and upon demanding to see the doctor were taken by three different nurses to examining rooms where the nurses proceeded to remove their clothing and directed the males to do the same. In succeeding scenes there were frequent cuts back and forth to the doctor's office in which the events previously described were being transacted to the three examining rooms.

In the first examining room, the first female nurse, white, apparent age early 20's with shoulder length curly brown hair,

was now nude. With her was a tall white male appearing to be in late adolescence, also nude. During the many cuts back and forth to this couple, the male performed cunnilingus on the female. The female performed fellatio on the screen, climaxed by closeup shots of the male organ in the female mouth with his seminal fluid pouring fourth over her chin. Subsequently, this same couple performed various acts of copulation in various positions on screen, interspaced with the scenes previously described where shots of the second nurse and her male companion who were in another examining room.

The second nurse, white female, with shoulder length black hair, was totally nude. This female appeared to be in her early to mid 20's with large breasts. Her male companion also nude, appeared to be medium height with black hair. This couple also performed various on screen acts of fellation, cunnilingus and coitus in various positions climaxed by an act of reciprocal oral intercourse, with the female above in the "69" position. All of the above scenes were interspersed with scenes of the 4th couple.

The fourth nurse was an athletic looking, long-haired blonde, apparently in her 20's. She was also nude. Her male companion appeared to be in his late 20's with short, dark, curly hair. They also performed on screen acts of fellatio, cunnilingus and coitus, particularly showing shots of intercourse in the female superior position with closeups of her vagina as it rose and fell on the penal shaft.

In the final scenes of the movie, the young female patient had left as had the male patient with the first nurse who paid her $20.00. That nurse then went to the doctor's office where he requested that she submit to a vaginal examination and upon her exposing herself, he declared, "You still have the prettiest pussy in the world." He then performed cunnilingus upon her, after which he invited her to have lunch on his penis, which she did. They then engaged in sexual intercourse on screen.

In the final scenes of the movie, the first nurse then goes into the examining room where the third nurse is now engaged in reciprocal oral intercourse in the female superior "69" position. She tells the third nurse that the doctor wants her, and that she will take over. The third nurse removes the male's penis from her mouth and, getting up, leaves. The first nurse then assumes her position, her pubic area in immediate proximinity to the male's mouth and takes his penis into her mouth. All of which is shown on screen.

At the end of the movie, the girls are counting up the money they have received for their various services. This movie closes as the third male patient returns to see the doctor, upon seeing him and receiving a convential treatment for which he was charged $5.00 told the doctor he preferred the $20.00 treatment.

3. Several previews shown as coming attractions, not necessarily in this order:

First: A preview entitled "Teen-age Cowgirls." During this preview, two adolescent females, one black, one white, are shown in closeup scenes of fellatio and copulation, all of which are shown on screen. During these scenes, a narrator's voice was heard urging patrons to attend this future feature in which they would be shown explicit sex at its wildest in the west.

Second: A preview for a movie as a coming attraction at the Cinema X theater, 716 Monmouth Street, Newport, Kentucky, was shown entitled, "Black on White." During this preview, on screen were shown various acts of fellatio cunnilingus and coitus by a white male and black female and a black male and white female. During these scenes, a narrator's voice was heard stating that this was a future offering of this theater and asking whether you, as a white male had ever wondered about sex with a black female, using slang expressions to describe her anatomy. The voice then asked whether

you, as a white female had ever wondered what it would be like to have a black penis (slang term was actually used). The narrator continued that you would find out in this movie when a black couple moved into next door to a white couple.

Third: A preview of a movie to be shown at a future time at Cinema X theater, entitled "Memories of a Madam." This preview opened with a bed shot of three couples in various states of nudity on the same bed engaged in various oral and genital acts and with one female applying a vibrator to her vaginal area. During subsequent scenes, the narrator's voice was heard saying that you would see what it would be like to be the proper female librarian by day and by night desire to be tied helplessly as a large black stud exposed himself and you begged him to rape you. During this narration, scenes of a white female and black male engaged in copulation in the male superior position were shown. The narration also said that you would see what would happen when an otherwise virile male had to don the female undergarments to obtain tumesence. It showed a male tied to a bed being violently slapped in the face.

Fourth: A preview was presented for a movie entitled, "A Few Bucks More" to be presented at the Cinema X Theater, 716 Monmouth Street, Newport, Kentucky, in which two men were shown on a couch or bed, their erect penises exposed as two women kneeling before them fellatio them, climaxed by both ejaculating in the mouths of the females, the seminal fluid flowing over the females' chins. The narrator's voice was heard urging you to see the dirties sex ever in the future feature.

A fifth preview was shown whose exact title the affiant recalls as "Let Me Count the Lays" for future presentation at the Cinema X theater, 716 Monmouth Street, Newport, Kentucky. The narration of this preview said that it would show you the wedding night of a super-stud husband and his "cherry" virgin wife as she attempted to gain more time by having him detail all his past sexual adventures. During this narration,

various scenes were shown of the male engaging in cunnilingus, fellatio and copulation with various females.

During the course of affiant's investigation, he also discovered that the film, "Deep Throat" was made in California. He has also discovered that shipments of film addressed to Cinema X theater, 716 Monmouth Street, Newport, Kentucky, have been received through the agency of Greyhound Express for the past several months. He further discovered that a shipment of film was received at the Greyhound Bus Station addressed to Cinema X theater, 716 Monmouth Street, Newport, Kentucky, from Evanstown, Indiana, during the month of January and that the present feature attraction "Deep Throat" began to run at the said Cinema X theater on January 31.

/s/Vernon R. Glossup
Special Agent - FBI
2/26/1973

Sworn to before me, and subscribed in my presence,

/s/Robert Cetrulo
United States Magistrate.

EXHIBIT NO. 13
(Filed March 3, 1973)

UNITED STATES MAGISTRATE
EASTERN DISTRICT OF KENTUCKY

RECORD OF PROCEEDINGS--MISCELLANEOUS

BEFORE: ROBERT C. CETRULO, Covington, Kentucky

This form should be used to record proceedings for which Forms AO 100 and AO 101 are not adapted, such as applications for search warrants, extradition proceedings, depositions in civil cases, proceedings for the release of poor convicts, references in civil or admiralty cases, attachments and subsequent hearings in internal revenue matters, proceedings to settle or certify nonpayment of seamens wages, civil rights proceedings, detention of witnesses on proceedings in connection with criminal proceedings, if not included in Form AO 100, etc. A separate page should be used for each proceeding, showing the title of the case, its nature, and the date and nature of each step taken.

Magistrate's Docket No. 3, Case No. 192

United States of America	:	
	:	
vs.	:	
	:	APPLICATION FOR
Stanley Marks, d/b/a Cinema	:	SEARCH WARRANT
X Theater, 716 Monmouth	:	
Street, Newport, Kentucky	:	

2-26-73 --Filing of verified Application for Search Warrant supported by two Affidavits.

2-26-73 --Execution and issuance of Order setting time and place of adversary hearing for February 27, 1973 at 2:00 P.M.

2-26-73 –Legal Research.

2-27-73 –Receipt and review of Briefs of counsel. Oral argument of counsel. Full preliminary hearin gon issue of probably cause with respect to issue of alleged obscenity of material sought to be seized.

2-27-73 –Execution of return by Special Agent Paul L. Shannon, FBI, and Lewis Paul Russo, Special Agent, FBI, certifying service of the Order of hearing on February 27, 1973 at 1:20 P.M. EST on Stanley Herman Marks owner of Cinema X Theater, Newport, Kentucky.

2-27-73 – Execution of return by Special Agent Vernon R. Glossup, and certifying service of the Order of hearing on February 26, 1973 on Jay Trimble, cashier, Cinema X Theater, 716 Monmouth Street, Newport, Kentucky on February 26, 1973 at 1:51 P.M. EST.

2-27-73 – Issurance of search warrant.

2-28-73 –Return of executed search warrant made by Special Agent Glossup before Magistrate Cetrulo, with attached two page inventory.

EXHIBIT NO. 14
(Filed March 1, 1973)

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY
CONVINGTON

UNITED STATES OF AMERICA	:	Magistrate's Docket No. 3
VS.	:	Case No. 192
STANLEY MARKS dba Cinema X Theater 716 Monmouth Street Newport, Kentucky	: : : :	SEARCH WARRANT

To Any Special Agent of the Federal Bureau of Investigation Affidavit having been made before me by Vernon Glossup and Ron Aebly that he is positive that on the premises known as

Cinema X. Theater
716 Monmouth Street
Newport, Kentucky

Campbell County in the Eastern District of Kentucky there is now being concealed certain property, namely

1. One movie film entitled "Deep Throat", a Vanguard film directed by Jerry Gerrard, produced by Lou Perry.
2. One movie film entitled "Carnal Cure" produced by Emilo Portici.
3. One set of previews consisting of clips of movie films variously entitled

which are obscene, lude, lascivious, and filty and were knowingly transported in interstate commerce for the purpose of

sale and distribution in violation of Title 18, Section 1465, United States Code. and as I am satisified that there is probable cause to believe th t the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search at any time in the day or night and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 27th day of February, 1973.

/s/Robert C. Cetrulo.
U.S. Magistrate

RETURN

I received the attached search warrant 2/27/1973, and have executed it as follows:

On 2/27/1973 at 6:28 o'clock P.M., I searched the premises described in the warrant and

I left a copy of the warrant with Jerome Cloud together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

This is to Certify that on February 27, 1973 at Newport, Kentucky, Special Agents of the Federal Bureau of Investigation, U.S. Department of Justice, at the time of conducting a search of the Cinema X Theater, 716 Monmouth Street, Newport, Kentucky, premises, obtained the below listed items. I

further certify that the below list represents all that was obtained by Special Agents of the Federal Bureau of Investigation, U.S. Department of Justice.

1. Approximately 300 half sheets advertising "Deep Throat".
2. 1 hand printed sign for "Carnal Cure".
3. 4 schedules for times of "Deep Throat, "Swing High", and "Carnal Cure".
4. One shipping carton which contained two reels marked "Swing High" – no film –
5. 1 piece of broken tape inscription "Deep Throat".
6. 2 reels "Deep Throat", "Teenage Cowgirls", "Black on White", "A few Bucks More", "Memoirs of A Madame", "Let me Count the Lays", "Doctors Disciples".
7. 2 reels containing movie "Swing High".;
8. 1 green plastic treash bag containg add of "Deep Throat".
9. 9 advertising posters taken from lobby and approximately 400 half sheets add for "Deep Throat".

This inventory was made in the presence of Jerome Cloud, Attorney Andrew Dennison and Special Agent William S. Dillon.

I swear that his Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/Vernon R. Glossup

Subscribed and sworn to and returned before me this 28th day of February, 1973.

/s/Robert C. Cetrulo
U. S. Magistrate.

EXHIBIT NO. 15
(Filed March 5, 1973)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

UNITED STATES OF AMERICA,
Plaintiff

Magistrate's Docket No. 3
Case No. 192

vs.

NOTICE OF APPEAL

STANLEY MARKS, d.b.a.
CINEMA X THEATRE,
Defendant

Notice is hereby given that Stanley Marks, defendant herein, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Order overruling defendant's Motion to Dismiss, thereby permitting seizure of matter protected by the First Amendment and the impossition of impermissible prior restraint, entered in this action on the 28th day of February, 1973.

/s/ANDREW B. DENNISON
Attorney for Defendant
and
CHARLES J. SCHERER

Certification:

I hereby certify that a copy of the foregoing Notice of Appeal was delivered this 5th day of March, 1973, to the United States Attorney.

/s/ Andrew B. Dennison
Attorney for Defendant

INDICTMENT
(Filed April 27, 1973)

NO. 11,057

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

THE UNITED STATES OF AMERICA

vs.

STANLEY MARKS DBA CINEMA X THEATRE, HARRY MOHNEY, GUY WEIR, AMERICAN AMUSEMENT COMPANY, INC. and AMERICAN NEWS COMPANY, INC. aka AMERICAN NEWS DISTRIBUTING COMPANY

INDICTMENT

T. 18, Sec. 1465, USC – Transporting obscene films in interstate commerce for sale or distribution – 8 Cts.
T. 18, Sec. 371, USC – Conspiring to violate Title 18, Sec. 1465, USC – 1 Ct.

A true bill, /s/ James A. Middleton, Foreman.

COUNT 1
(Title 18, Sec. 1465, USC)

THE GRAND JURY CHARGES:

That on or about some date to the Grand Jury unknown, but between the dates of January 24 and January 31, 1973,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC, AKA
AMERICAN NEWS DISTRIBUTING COMPANY

knowingly transported and caused to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unkn[illegible], to Newport, Campbell County, in the Eastern District of Kentucky, copies of an obscene, lewd, lascivious and filthy film entitled, "Deep Throat" for the purpose of the sale and distribution of said film.

COUNT 2
(Title 18, Sec. 1465, USC)

THE GRAND JURY FURTHER CHARGES:

That on or about some date to the Grand Jury unknown, but between the dates of February 1st and February 27th, 1973,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GURY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

knowingly transported and caused to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of an obscene, lewd, lascivious and filthy film entitled, "Swing High" for the purpose of the sale and distribution of said film.

COUNT 3
(Title 18, Sec. 1465, USC)

THE GRAND JURY FURTHER CHARGES:

That on or about some date to the Grand Jury unknown, but between the dates of January 15 and February 27, 1973,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

knowingly transported and caused to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of an obscene, lewd, lascivious and filthy film preview entitled, "Doctor's Disciples" for the purpose of the sale and distribution of said film.

COUNT 4
(Title 18, Sec. 1465, USC)

THE GRAND JURY FURTHER CHARGES:

That on or about some date to the Grand Jury unknown, but between the dates of January 15 and February 27, 1973,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

knowingly transported and caused to be transported in interstate commerce from the states of Michigan, Indiana and other

states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of an obscene, lewd, lascivious and filthy film preview entitled, "Teenage Cowgirls" for the purpose of the sale and distribution of said film.

COUNT 5
(Title 18, Sec. 1465, USC)

THE GRAND JURY FURTHER CHARGES:

That on or about some date to the Grand Jury unknown, but between the dates of January 15 and February 27, 1973,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

knowingly transported and caused to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of an obscene, lewd, lascivious and filthy film preview entitled, "Black On White" for the purpose of the sale and distribution of said film.

COUNT 6
(Title 18, Sec. 1465, USC)

THE GRAND JURY FURTHER CHARGES:

That on or about some date to the Grand Jury unknown, but between the dates of January 15 and February 27, 1973,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

knowingly transported and caused to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of an obscene, lewd, lascivious and filthy film preview entitled, "A Few Bucks More," for the purpose of the sale and distribution of said film.

COUNT 7
(Title 18, Sec. 1465, USC)

THE GRAND JURY FURTHER CHARGES:

That on or about some date to the Grand Jury unknown, but between the dates of January 15 and February 27, 1973,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

knowingly transported and caused to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of an obscene, lewd, lascivious and filthy film preview entitled, "Memoirs Of A Madam" for the purpose of the sale and distribution of said film.

COUNT 8
(Title 18, Sec. 1465, USC)

THE GRAND JURY FURTHER CHARGES:

That on or about some date to the Grand Jury unknown, but between the dates of January 15 and February 27, 1973,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

knowingly transported and caused to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of an obscene, lewd, lascivious and filthy film preview entitled, "Let Me Count The Lays" for the purpose of the sale and distribution of said film.

COUNT 9
(Title 18, Sec. 371, USC)

THE GRAND JURY FURTHER CHARGES:

That beginning on or about August 1, 1970 and continuing to February 27, 1973, in the Eastern District of Kentucky,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

named as defendants herein, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with diverse other persons to the Grand Jury unknown, to transport and cause to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown to Newport, Campbell County, in the Eastern District of Kentucky, copies of obscene, lewd, lascivious and filthy films, for the purpose of the sale and distribution of said films, in violation of Title 18, Section 1465, United States Code.

It was part of said conspiracy that the defendants,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

would knowingly transport and cause to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of obscene, lewd, lascivious and filthy films entitled, "Deep Throat," "Swing High," film previews entitled, "Doctor's Disciples", "Teenage Cowgirls," "Black on White," "A Few Bucks More," "Memoirs of A Madam," "Let Me Count The Lays" and various other films and film previews to the Grand Jury unknown, for the purpose of the sale and distribution of said films and film previews.

It was further a part of said conspiracy that the defendants and co-conspirators would misrepresent, conceal and hide and cause to be misrepresented, concealed and hidden, the purposes of and the acts done in furtherances of the conspiracy.

OVERT ACTS

1. At the times herein after mentioned, the defendants committed the following overt acts in furtherance of said conspriracy and to effect the objects thereof:

1. On or about a day to the Grand Jury unknown, but between August 26, 1970 and September 30, 1970, in the Eastern District of Kentucky, the defendants,

HARRY MOHNEY
STANLEY MARKS
DBA
CINEMA X THEATRE

caused a telphone, Number 581-9707, to be installed at 716 Monmouth Street, Newport, Kentucky.

2. On or about the 11th day of April 1973, in the Eastern District of Kentucky, the defendants

AMERICAN AMUSEMENT COMPANY, INC.

caused the billing on the phone No. 581-9707 listed in Overt Act 1 above to be changed from

"Cinema X Theatre
Mohney Enterprises
8250 E. Lansing Rd.
Durrand, Michigan 48429

to "Cinema X Theatre
c/o American Amusement Company, Inc.
P.O. Box 373
Durrand, Michigan 48429

3. On or about a day unknown to the Grand Jury, in the Eastern District of Kentucky, the defendants,

HARRY MOHNEY
STANLEY MARKS
DBA
CINEMA X THEATRE
716 Monmouth Street
Newport, Kentucky

between the dates of March 1, 1972 and March 31, 1972 caused a telephone, No. 291-9419 to be installed at Cinema X Theatre, 716 Monmouth Street, Newport, Kentucky.

4. On or about the 11th day of April 1973, in the Eastern District of Kentucky, the defendant,

AMERICAN AMUSEMENT COMPANY, INC.

caused the billing of the phone no. 291-9419 listed in Overt Act 3 above to be changed from:

"Cinema X Theatre
c/o Mohney Enterprises
8250 E. Lansing Rd.
Durand, Michigan 48429

to: "Cinema X. Theatre
c/o American Amusement Company, Inc.
P.O. Box 378
Durand, Michigan 48429

5. That on or about dates to the Grand Jury unknown, but between the dates of August 26, 1970 and February 27, 1973, in the Eastern District of Kentucky, the defendants,

HARRY MOHNEY
STANLEY MARKS
DBA
CINEMA X THEATRE
716 Monmouth Street
Newport, Kentucky

conversed in and inspected the Cinema X Theatre at 716 Monmouth Street, Newport, Kentucky.

6. That on or about dates to the Grand Jury unknown, but between August 26, 1970 and February 27, 1973, in the Eastern District of Kentucky, the defendants,

GUY WEIR
STANLEY MARKS
DBA
CINEMA X THEATRE
716 Monmouth Street
Newport, Kentucky

conversed in and inspected the Cinema X Theatre at 716 Monmouth Street, Newport, Kentucky.

7. That on or about dates to the Grand Jury unknown, but between August 26, 1970 and February 27, 1973, in the Eastern District of Kentucky, the defendant

GUY WEIR

inspected and helped repair projecting equipment at the Cinema X Theatre, 716 Monmouth Street, Newport, Kentucky.

8. That commencing on or about the 26th day of August and continuing until February 27, 1973, in the Eastern District of Kentucky, the defendants,

GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.

booked and supplied obscene films to the Cinema X Theatre, 716 Monmouth Street, Newport, Kentucky, and various other theatres to the Grand Jury unknown.

9. That commencing on or about August 26, 1970

9. That commencing on or about August 26, 1970 and continuing to February 27, 1973, in the Eastern District of Kentucky, the defendant,

STANLEY MARKS
DBA
CINEMA X THEATRE
716 Monmouth Street
Newport, Kentucky

operated the Cinema X Theatre, 716 Monmouth Street, Newport, Kentucky.

10. That beginning on January 1, 1972 and continuing until December 31, 1972 in the Eastern District of Kentucky, the defendant,

AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

paid the salary of various employees of Cinema X Theatre, 716 Monmouth Street, Newport, Kentucky.

11. That on or about the 16th day of October, 1972, the defendant,

AMERICAN AMUSEMENT COMPANY, INC.

sent a letter to the city of Newport in the Eastern District of Kentucky about the city taxes on employees at Cinema X Theatre, 716 Monmouth Street, Newport, Kentucky.

12. That on or about the 20th day of January, 1973, the defendant,

AMERICAN AMUSEMENT COMPANY, INC.

shipped a film by commercial air carrier from Durand, State of Michigan, to Cinema X Theatre, 716 Monmouth Street, Newport, in the Eastern District of Kentucky.

A TRUE BILL

/s/James A. Middleton
FOREMAN

EUGENE E. SILER, JR.
UNITED STATES ATTORNEY

By: /s/James E. Arehart
Assistant United States Attorney

MEMORANDUM
(Filed October 5, 1973)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

NO. 11,057

UNITED STATES OF AMERICA — PLAINTIFF

v.

STANLEY MARKS dba Cinema X Theatre, et al — DEFENDANTS

MEMORANDUM

The court is confronted with eight motions filed by the defendants: (1) motion by the defendant Marks to dismiss; (2) motion by Marks for the return and suppression of confiscated property; (3) motion by all defendants (except Marks) to dismiss; (4) motion by all defendants (except Marks) for discovery; (5) motion by all defendants for a bill of particulars; (6) motion by all defendants for inspection of grand jury minutes; (7) motion by all defendants for production of evidence inconsistent with guilt; (8) motion by Marks to join with the other defendants in their motions for evidence inconsistent with guilt; inspection of grand jury minutes; bill of particulars; discovery; and dismissal.

The Government and other defendants have offered no objection to Marks' request for consolidation; accordingly, an order will be entered sustaining that motion.

Motion to Suppress

This motion, filed only on behalf of Marks, seeks the suppression and return of the films generative of this prosecution. The defendant assails the scope and manner of inquiry utilized prior to seizure as well as the First Amendment deprivations allegedly occasioned by the confiscation.

This court is unable to discern any defect in the Magistrate's hearing that would justify the relief sought. Much is made of the failure of the Magistrate to actually view the films in question; instead, he was presented affidavits describing the factual occurrences portrayed on the screen. This method, which was accepted for an initial seizure in Merritt v. Lewis, E.D. Cal., 309 F. Supp. 1249, 1253 (1970), satisfies the court that the issuing officer was adequately apprised of the contents of the challenged films, while avoiding needless technicality and insuring a pragmatic approach to the issuance of a warrant. See Court v. United States, 6th Cir., 426 F.2d 1354 (1970); United States v. Kidd, 6th Cir., 407 F.2d 1316 (1969). The accounts used herein are in no way comparable to the conclusory affidavits condemned in Marcus v. Search Warrant, 367 U.S. 717 (1961) and Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968). The procedure employed clearly allowed the Magistrate to "focus searchingly on the question of obscenity", as required by Marcus, supra at 732.

The defendant claims that the Government's failure to return the seized materials results in a prior restraint upon the exercise of constitutional guarantees. This issue was resolved against the defendants by order of this court dated April 6, 1973. Further, the accused is mistaken in his argument that Heller v. New York, ____ U.S. ____, NO. 71-1043 (June 25, 1973), mandates a return of confiscated material where there is danger of a prior restraint on communicative rights; Heller attempted to balance prosecutorial interests against the possible censorial effect of seizing items not yet ruled obscene:

> "(O)n a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned." Id. at 9.

The record in this case does not reveal either a demonstration by the defendant of the unavailability of copies, or a request for permission to duplicate the movies seized. It is therefore apparent that any First Amendment dilution which occurred through the seizure was the result of the defendants' failure to satisfy the prerequisites outlined in Heller.

The claim that the absence of a constituitional standard of obscenity prior to Miller rendered the Magistrate's proceedings defective is discussed and rejected in connection with the motion to dismiss; Miller forged no new standard, but merely clarified certain ambiguities present in the tests devised earlier.

The defendant's motion to suppress will be overruled.

Motion to Dismiss

The court is not persuaded by the numerous theories for dismissal propounded by the defendants; although it is admittedly difficult to frame cohesive responses to the multitude of propositions forwarded, the arguments may be roughly divided into those attacking the constitutionality of 18 U.S.C. 1465 and those challenging the indictment itself.

The assailed statute proscribes the interstate transportation for sale of the following items:

> "any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph

> recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U.S.C. 1465.

It is well understood that obscenity is undeserving of constitutional protection, Miller v. California, ____ U.S. ____, NO. 70-73 (June 21, 1973); Roth v. United States, 354 U.S. 476 (1957); rather, the defendants' attack relates primarily to definitional terms utilized in the statute. This criticism is unwarranted in view of Roth v. United States, supra, and United States v. Orito, ____ U.S. ____, NO. 70-69 (June 21, 1973), which rebuked challenges leveled against substantially identical language in 18 U.S.C. 1461 and 1462. See also United States v. Cote, 5th Cir., 470 F.2d 755 (1972). A statutory provision will not suffer constitutional invalidation merely because of a lack of complete precision. The fact that certain conduct may fall on either side of legislative terms descriptive of an offense is not fatal so long as an adequate warning of sanctioned activity is conveyed. Roth v. United States, supra at 491-492. The Court in Nash v. United States, 229 U.S. 373, 377 (1913), recognized that many equivocal acts require a forecast of a jury's subsequent reactions:

> "(T)he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or short imprisonment . . . he may incur the penalty of death."

See also United States v. Wurzbach, 280 U.S. 396 (1930).

The constitutionality of 18 U.S.C. 1465 is not weakened by the Supreme Court decisions in Miller v. California, supra, and accompanying cases. Although these opinions did clarify the earlier disputes surrounding the obscenity question, it

would be simplistic to abandon all earlier attempts in the same direction. The impropriety of such an action is revealed in United States v. Orito, supra, affirming the constitutionality of 18 U.S.C. 1462, and United States v. 12 200 foot reels, ____ U.S. ____, NO. 70-2 (June 21, 1973), where the Court indicated that any ambiguity in 19 U.S.C. 1305 could be resolved by an interpretation consistent with current judicial reasoning.

It is also argued that since Miller formulated a new test of obscenity, prosecution of these defendants for conduct prior to that opinion would invoke the constitutional proscription of ex post facto culpability. This position misapprehends both Miller and the Ex Post Facto Clause.

It should initially be noted that the Ex Post Facto Clause is intended to apply to statutory enactments, not judicial construction. Frank v. Mangum, 237 U.S. 309 (1915); United States v. Rundle, 3d Cir., 383 F.2d 421 (1967), cert. denied 393 U.S. 863 (1968). Although Bouie v. City of Columbia, 378 U.S. 347 (1964), did hold that a retroactive application of a court interpretation may offend the Due Process Clause, it is evident that the factors present in the obscenity area render that case easily distinguishable; the Bouie holding should be applied only to decisions which are "'unexpected and indefensibe by reference to the law which had been expressed prior to the conduct in issue . . .'." Id. at 354. As admitted by the defendant, the previous uncertainty in the realm of obscenity has only been settled by the recent Supreme Court decisions. The Miller group did not create a new definition of illegal conduct, but merely clarified earlier concepts of obscenity of which the defendants were constructively aware. Rosen v. United States, 161 U.S. 29 (1896); Nash v. United States, supra; United States v. Wurzbach, supra. Further, the Court's action in remanding Miller and its accompanying cases to the lower courts for re-evaluation in light of the clarified standards intimates that the use of the Miller standard in the case at bar is entirely proper; prospective application would have been decreed if constitutional violation had been feared.

The defendants cite in support of this argument United States v. Lang, C.D. Cal., NO. 10712-HP-CD (June 25, 1973), where a prosecution founded on federal obscenity laws was dismissed in response to the alterations wrought by Miller. This court cannot agree with that decision and notes the four contrary decisions cited by the Government: United States v. Sians, 7th Cir., NO. 71-1346 (July 5, 1973); United States v. Wasserman, W.D. Tex., NO. A-72-CR-71 (July 25, 1973); United States v. Pinkus, C.D. Cal., NO. 11444-DW-CD (July 16, 1973); United States v. Hill, S.D. Fla., NO. 73-347 Cr.-NCR.

The attack upon the indictment itself is similarly misplaced. The allegation of invalidity due to the absence of evidence relating to obscenity before the grand jury is without merit. The validity of an indictment is ascertained on its face, not through a probing reappraisal of the evidence before the grand jury; the implementation of such a course would ultimately result in a preliminary trial conducted before the grand jury:

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequancy of the evidence before the grand jury. This is not required . . . An indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits." Costello v. United States, 350 U.S. 359, 363 (1956).

The claim that the nonexistence of evidence relating to scienter warrants dismissal reveals a misunderstanding of the underlying statutory requirements. The federal obscenity provisions do not require a personal belief on the part of the

accused that challenged material is obscene; reliance on Smith v. California, 361 U.S. 147 (1959), is misplaced since

> "Smith has not been interpreted to require that the defendant know the material to be obscene, but merely know what the material contains, leaving legal rulings to the courts." United States v. Gundlach, M.D.Pa., 345 F. Supp. 709, 717 (1972).

The arguments generated by alleged procedural abuses are easily disposed of. First, the defendants attack the government's failure to accord a hearing on the question of obscenity prior to the return of the indictment. Although a hearing is mandated prior to the seizure of materials, Marcus v. Search Warrant, 367 U.S. 717 (1961); Cambist Films, Inc. v. Tribell, E. D. Ky., 293 F. Supp. 407 (1968), there is no requirement for such a process as a condition precedent to the return of an indictment. It further appears that the scope and manner of the hearing satisfied the requirement for an independent judicial evaluation of obscenity. The Magistrate did not view the films in question; however, affidavits describing the factual occurrences portrayed in the movies and prepared by agents who had been exposed to the material were presented to the Magistrate.

The defendants finally claim that the twelve overt acts delineated in the indictment are not sufficient to support a conspiracy charge under 18 U.S.C. 371; the court disagrees. Although the separate actions viewed in an isolated manner reflect a semblance of innocent conduct, a pragmatic examination of these allegations immunizes this charge from dismissal.

Examination of the conspiracy count reveals that it alleges both an unlawful purpose and overt acts manifesting the implementation of a conspiracy. United States v. Root, 9th Cir., 366 F.2d 377 (1966), cert. denied 386 U.S. 912 (1967); United States v. Offutt, D.C. Cir., 127 F.2d 336 (1942). While the commission of an overt act must be alleged and proven, the act itself does not comprise the offense. Hudspeth v. McDonald,

10th Cir., 120 F.2d 962 (1941), cert. denied 314 U.S. 617 (1941). In United States v. Turner, E.D. Tenn., 274 F. Supp. 412 (1967), the court was confronted with an allegation similar to that forwarded herein:

> "These defendants also move to strike paragraphs 2 and 4 of count 1 on the ground they do not charge the defendants with the commission of unlawful acts. This is not necessary. Many overt acts that are committed in pursuance of the conspiracy may be lawful. Only one overt act whether lawful or unlawful committed in pursuance to a conspiracy is sufficient." Id. at 415.

The court is convinced that the defendants were adequately apprised of the charge.

An order will be entered overruling the motion to dismiss.

Motion for Discovery

The defendants seek through this motion any evidence possessed by the Government which might possibly be used in this prosecution, including, but not limited to: (1) memoranda or statements by the defendants or their agents concerning the facts of this action; (2) grand jury testimony; (3) tangible objects taken from the defendants; (4) eavesdropping evidence obtained through electronic means; (5) memoranda or conduct of any person which generated the arrest of these defendants; (6) any records formulated during the past two years pertaining to obscenity investigations by the Government.

An anlaysis of this motion requires recognition of the different standards of proof which the defendant must satisfy to secure various forms of evidence. Rule 16(a), Federal Rules of Criminal Procedure, provides that the court, upon motion of the defendant, "may" order the production of: (a) written statements by the defendants; (b) reports of physical and

scientific tests and examinations; (c) the defendant's recorded testimony before the grand jury. Although conflict exists as to whether this information is available as a matter of right and without a showing of need, 1 Wright, Federal Practice and Procedure, Section 253, pp. 500-503, notes 33-35, there appears no justification for denying such information in the case at bar. See United States v. Turner, E.D. Tenn., 274 F. Supp. 412 (1967).

For the reasons noted in the discussion of the motion to inspect the grand jury minutes, the defense is entitled to inspect any statements or grand jury testimony offered by the defendants on their corporate officers or employees acting in response to subpoenae directed to the corporation, but not evidence relating to the testimony of other persons.

Rule 16(b) allows the defendant access to tangible objects in the possession of the Government only upon a demonstration of materiality and reasonableness. Aside from a bare prefatory allegation that these requirements are present, the defendants claim that production of such material will: (1) protect the defense against illegally seized evidence; (2) provide a fair trial; (3) guarantee proper confrontation with witnesses; (4) enable effective assistance of counsel; (5) insure that all relevant evidence will be brought before the court; (6) either dispense with or shorten the trial. These arguments offer scant improvement over the broad statement offered above, and do not begin to furnish the standard of proof envisioned by the Rule.

> "(T)he requirement of Rule 16(b) of a showing of the reasonableness and materiality of the request is not satisifed by a mere conclusory allegation that the requested information is material to the preparation of the defense." United States v. Conder, 6th Cir., 423 F.2d 904, 910 (1970).

It is unnecessary to entertain the propriety of the demand for electronically intercepted information since the Government has responded that such methods have not been utilized in this case.

The requests in items five and six are denied. Although current rules envision ready availability of many items upon proper compliance by the defendant, matters identified with the investigatory phase of a case are protected;

> "this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses . . . to agents of the government . . . " Rule 16(b), Federal Rules of Criminal Procedure.

It is obvious that a demand for memoranda or conduct of individuals which fostered this prosecution falls squarely within the exclusion above. United States v. Wilkerson, 6th Cir., 456 F.2d 57 (1972); United States v. Turner, supra. The final request is patently impermissible as a bald attempt to invade the Government's "work product", not only in this case, but in all similar investigations throughout the country. See Gollaher v. United States, 9th Cir., 419 F.2d 520, 527-528 (1969), cert. denied 396 U.S. 960 (1969).

Motion for Bill of Particulars

The numerous requests forwarded in this motion can easily be classified into three major areas: (a) the legal theories upon which the Government expects to rely; (b) a detailed narration of the exact manner in which the criminal acts occurred; (c) the names of any witnesses to the commission of this offense; (d) past offenses of the defendants.

The extreme breadth of this motion illustrates an apparent misconception of the purpose of a bill of particulars: It is not a discovery device intended to disengorge evidentiary matter, but a discretionary aid designed to

> "provide defendant with information about the details of the charge against him if this is necessary to the preparation of his defense, and to avoid prejudicial suprise at the trial . . .
>
> The test in passing on a motion for a bill of particulars should be whether it is necessary that defendant have the particulars sought in order to prepare his defense and in order that prejudicial suprise will be avoided. A defendant should be given enough information about the offense charged so that he may, by the use of diligence, prepare adequately for the trial. If the needed information is in the indictment or information, then no bill of particulars is required." 1 Wright, Federal Practice and Procedure, Section 129, at pp. 283-284.

The defendants' requests for governmental interpretations of obscenity statutes and court decisions are denied. A bill of particulars is not intended to inform the defendant of the prosecution's legal theories or conclusions. Similar demands were refused in United States v. Luros, N.D. Iowa, 243 F. Supp. 160, 172 (1965), cert. denied 382 U.S. 956 (1965):

> "Paragraphs 1 and 2 of the defendants' motion ask for the definitions of the words 'obscene', 'lewd', 'lascivious', 'indecent', and 'filthy'. The Government is not required to state the definitions of legal terms."

See also United States v. Bearden, 5th Cir., 423 F.2d 805 (1970), cert .denied 400 U.S. 836 (1970).

The last two requests must also be denied. Although there may be circumstances in which a list of witnesses should be produced, Will v. United States, 289 U.S. 90, 99 (1967), there has been absolutely no indication that this request has a legitimate foundation. See United States v. Rimanich, 7th Cir., 422 F.2d 817, 818 (1970); Hickman v. United States, 5th Cir., 406

F.2d 414 (1969), cert. denied 394 U.S. 414 (1969). The request for information of defendants' of witnesses' prior criminal records is equally unavailing as this information considerably surpasses the scope of a bill of particulars. United States v. Johnson, N.D. Ill., 298 F. Supp. 58, 62 (1969); United States v. Mavrogiorgis, S.D.N.Y., 49 F.R.D. 214 (1969).

An order will be entered overruling this motion.

Motion to Inspect Grand Jury Minutes

This motion seeks any recorded grand jury proceedings, including testimony of the individual defendants and officers or employees of the corporate defendants; the movants alternatively seek a summary of the evidence presented if the grand jury sessions were not transcribed.

The availability of grand jury testimony is partially governed by Rule 16(a), Federal Rules of Criminal Procedure:

> "Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant . . . (3) recorded testimony of the defendant before a grand jury."

Although this Rule is cast in discretionary terms, the prevailing authority favors permitting the defendant inspection of his own grand jury testimony. United States v. Turner, supra; 1 Wright, Federal Practice and Procedure, Section 253, pp. 507-508. Further, this court is included to follow the approach adopted in United States v. Aeroquip Corporation, E.D. Mich., 41 F.R.D. 441 (1966), regarding the accessibility of officers' and employees' testimony:

> "(T)he court adopts a limited construction of Rule 16(a) (3) to permit at this time, as a matter of right, pretrial disclosure to a corporate defendant only of

> the grand jury testimony of corporate officers, who were officers at the time they so testified and of individuals who testified before the grand jury in response to subpoenas *duces tecum* directed to the corporation." Id. at 446.

United States v. Louis Carreau, Inc., S.D.N.Y., 42 F.R.D. 408 (1967).

A demand for the grand jury testimony of other witnesses is governed not by the permissive Rule 16(a), but by the more restrictive provisions in Rule 6(e), Federal Rules of Criminal Procedure. Despite the tendency of recent cases to abandon the heavy burden formerly placed upon the movant, see 1 Wright, Federal Practice and Procedure, Section 108, some showing of "particularized need" must still be offered before the production of grand jury testimony will be directed; this court rejects bare allegations that the material is required to adequately prepare for trial or to furnish grounds for dismissal. United States v. Hensley. 6th Cir., 374 F.2d 341 (1967), cert. denied 388 U.S. 923 (1967).

Dennis v. United States, 384 U.S. 855 (1966), noted by the defendants, does not propound the expansive posture urged. Although the Supreme Court recognized the potential injustice of the strict rules previously cited to withhold such information, that opinion did not command the dissemination of grand jury evidence merely upon demand.

The alternate request – for particulars if the grand jury testimony was not transcribed – is denied. The specific particulars sought relate not to the defendants' testimony, but to the question of whether evidence of "community standards," "dominant appeal," "prurient interest," and the like were presented. Further, summaries of unrecorded proceedings prepared by government officiers are no less confidential than the deliberations themselves. U.S. Industries, Inc. v. United States District Court, 9th Cir., 345 F.2d 18 (1965), cert. denied 382 U.S. 814 (1965).

The defendants' allegations are not sufficient to shatter the traditional secrecy accorded grand jury proceedings. An order will be entered sustaining this motion only as to the request for testimony by the defendants or their corporate officers or employees pertaining to the affairs of the defendant corporations.

Motion for Production of Evidence
Favorable to Accused

A motion characterized in this manner must be identified as little more than a "fishing expedition." The courts have agreed that requests incorporating this language are not contemplated by Rule 16, Federal Rules of Criminal Procedure; Wright comments that "general motions seeking discovery of anything in the possession of the government favorable to the defense have received a cold reception from the courts." 1 Wright, Federal Practice and Procedure, Section 254, at page 515. Such a welcome was extended by the Sixth Circuit in United States v. Moore, 6th Cir., 439 F.2d 1107, 1108 (1971):

> "To grant such a motion would place an almost impossible burden on the Government. The motion is not even limited to evidence in the possession of the Government. The Government would have to determine before the trial whether the evidence is favorable as well as relevant. If this pretrial practice were adopted, there would be little left of our adversary system. It must be remembered that in criminal cases the defendant is not required to disclose anything."

The specific requests proffered by the defendants are discussed above; a favorable ruling on this motion would result in the disengorgement of many materials not made discoverable by even the broadest interpretation of the Criminal Rules.

/s/Mac Swinford, Judge

October 5, 1973

JURY INSTRUCTIONS

* * * * * * *

(T. 842) (The Court) Now, the defendants did not take the witness stand and as I have stated to you I think the law requires that I given an instruction on that unless it is requested expressly that it not be given and I told you what my instruction would be in general terms.

What do you want to do about that?

(Mr. Dennison) Your Honor, I request that no instruction be given relative to the absence of the Defendant Marks to take the witness stand or to testify in his own behalf, relying upon the general instruction of the Court as to the burden of proof resting upon the government and that there is no duty of proof upon the defendant, without a comment relative to failure to testify.

(The Court) All right.

(Mr. Deitch) We concur, Your Honor.

(Mr. Albert) The corporate (T. 843) defendant American News agrees.

(Mr. Smith) I agree.

(The Court) In other words, you do not want the express instructions that the witnesses did not take the witness stand and that is not considered as any admission of guilt on their part. In other words, you do not want the words "did not take the witness stand" used at all; is that correct?

(Mr. Smith) Yes, sir.

(The Court) Very well. I will make no reference to it at all except in the general proposition that it is the responsibility of the government to prove its case.

(Mr. Smith) Yes, sir.

(The Court) Now, I have one other instruction here which I propose to give and which my study of these instructions offered by the respective sides does not adequately cover.

"You have been instructed on the basis of how a corporation can be held criminally liable on a charge of obscenity as set forth in the indictment; that is, only through its officers and agents under conditions which I have stated. This does not mean that the officers and agents under conditions which I have stated. This does not mean that the officers and agents may be cleared of wrongdoing in the event the corporation (T. 844) "is found guilty. The officers and agents, such as Mr. Weir and Mr. Mohney, may also be held accountable and thereby personally guilty of wrongdoing and if you believe from all the evidence or reasonable inferences that may be drawn from the evidence, to the exclusion of a reasonable doubt, that these defendants, Weir and Mohney, or either of them, knowingly and intentionally, either acting personally or causing another or others to act to effect the transportation of obscene films in interstate commerce from outside the State of Kentucky to this Eastern District of Kentucky for the purpose of sale or distribution, they may be found to be individually and personally guilty as charged in this indictment."

Now, I am going to give that instruction. I will make a correction here. I say "obscene films". I may identify that, make it apply to who is in the proof described, if you believed that they are obscene. In other words, that doesn't mean that some other thing has to be in the evidence in this case.

(Mr. Smith) May it please the Court, this is the first time that we have been exposed to the Court's instructions in this regard and on behalf of Mohney I would merely say to the Court at this (T. 845) point that the Court by the way it read the instruction is suggesting that the Court has found that the

evidence shows that Mohney was an officer or agent of the corporation. I think the Court sort of assumes in its instructions saying to the jury: "If you find that any of the individuals here, individual defendants, acted as officers and agents of the corporation, you may also find them individually guilty."

Does the Court follow my reasoning?

(The Court) I follow your line of reasoning. I do not put that connotation on it. You do object to it.

(Mr. Smith) I will at the proper time. I just wanted to advise you.

(The Court) I wanted to advise you of this before you made your argument, but I propose to give that instruction.

Now, gentlemen, that concludes our pretrial conference for this morning as far as I am concerned. Is there anything else you want to bring up at this time?

(Mr. Smith) Yes, Your Honor, I understand that it is the local practice and tradition for the government to be allowed to go last and not open and close, and we would for the record, since (T. 846) there is some division of authority in various circuits, contend that the government should be required to make a presentation and that it will be unfair to the defendants to have the government have the last word of its last argument, because we can't rebut anything whatsoever; what the government says in its argument when we are deprived of that right and the government can say everything it wants and we can make no response and if the Court proposes to follow that procedure, we will say that it is deprivation of our client's Fifth and Sixth Amendment rights.

(The Court) What do you have to say, Mr. De Falaise?

Do you speak for all defendants?

(Mr. Smith) Yes.

(Mr. DeFalaise) I think the rule has been, whatever division the rule is in other circuits, the rule in this circuit is that the United States puts on its case first but has the last closing argument and I believe at this point in time to vary this rule would be a serious deprivation of the outstanding rights of the United States.

(Mr. Smith) Well, I just heard about this rule this morning and I didn't have a chance (T. 847) to do research.

(The Court) That is the common law rule. The practice in Kentucky and in states generally under the old conformity rules of state practice ignored that rule. I am inclined to think that the objection is well taken. That doesn't mean that you have to give a full and complete argument of the case, but you do have to make a fair statement of your case. I am not putting you on terms as to time, but that means that you are to make a fair statement of what you rely on for a conviction and you may save the bulk of your arguments until your final argument, but I might also advise you that if you make an opening statement then the defense has a right to decline to put on any argument and that's it, you can't come back.

(Mr. Smith) If the Court please, will the Court be giving us a brief period of time to look at what the Court has ruled on before we have to argue?

(The Court) Yes.

(Mr. Smith) Thank you.

(The Court) I am going to take a recess now in light of my statement here.

(Reporter's note: The Court recessed for ten minutes. (T. 848) At the conclusion of the recess the defendants were

present with their counsel, the United States was represented by counsel, the jury resumed its place in the box. Opening argument was made in behalf of the government by Mr. DeFalaise. Closing arguments were made in behalf of the respective defendants by their counsel. Closing argument was then made by Mr. DeFalaise in behalf of the government.)

(The Court) Members of the jury, in order that you might be fully advised of our situation here, it is now a quarter of five. It will be necessary for me to instruct you tonight. It may take a little time to do it. I will make it as rapid as I can without overlooking anything, I hope. This is an involved case and one which requires some considerable rules of law to be given to you. I don't want to make it confusing to you and I assure you that I won't make it confusing to you. I don't want you to get the impression that this is so involved and so many technical terms used here that you are not qualified to decide the case, because that is not true. You are qualified to decide the case. This is a jury case. I don't know of a better type case for a conscientious jury to consider than this one. Before I conclude I will make the issue which you will have (T. 849) to decide very sharp. You will have no trouble in recognizing it, you will have no difficulty in applying the rules of evidence to the evidence, as I shall give them to you, and I am confident that you can arrive at a fair and a just verdict.

I am going to instruct you this evening, so tomorrow morning at 9:00 o'clock I can submit the case to you without any additional delay and you will have full opportunity to consider all of the evidence in the case, the whole case, without being under any pressure of time.

Now, in the first place I want to get back on the track a little bit. We have heard about five hours of argument, all of which I am sure was enlighting and helpful, but I do want to remind you that you are not to decide whether you like this law or don't like it. It is the law of the land. Considerable argument was made along the line that a person should be

able to do what he wanted to do, so long as he wasn't interfering with anybody else. Now, whether he is interfering with anybody else is a factual situation which we must consider as having been considered by the Congress and its committees before this law was enacted. This is the law of the land and I am going to read it to you. So (T. 850) you are not to treat it lightly on the assumption that, "what harm is it doing anybody so long as they don't pay to go see these pictures?" I don't know and I am not going to undertake to even suggest what the reason for the Congress were in enacting this statute. It is a statute which has been on the books, adopted by members of both houses of Congress, signed by the president of the United States at the time it was enacted and it is the law of the land. So we are not to concern ourselves with the fact that this is in violation of the First Amendment because it is not a violation of the First Amendment. I state that to you categorically and it is treated as a constitutional law so long as it is on the statute books and until the courts of the land declare it unconstitutional and it has been declared constitutional. So we start with that, not with any idea of belittling the law. This is a solemn enactment of Congress and you as jurors are sworn to uphold it.

Now, in order that there might not be any misunderstanding, this is not a state law in this case. There is a similar state law, or maybe a similar state law or one involving the same thing, but this is a law of the United States and it simply says that: "any obscene, lewd, lascivious, or filthy (T. 851) book, pamphlet, picture, film, paper, letter, writing, print, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character" shall not be transported in interstate commerce.

That is the law, that is what you are going to try this case on, to determine from this evidence in the light of the instructions which I will give you and all reasonable inferences may be drawn from the evidence whether or not these

defendants or any of them have violated that law within the meaning of the law and under the terms which I shall give you, meaning that their guilt must be established to your satisfaction.

You will probably hear this more than once throughout this instruction, "must be established to the exclusion of a reasonable doubt", as that term will be defined to you.

I make this statement at the outset of these instructions in order that we might not confuse ourselves with whether we like the law or dislike the law. I think I questioned you about that at the outset and it was indicated by me that you were not to consult your own personal feelings, but that you were to accept the law and determine whether (T. 852) or not it had been violated under the evidence.

Now, members of the jury, these defendants and each of them are presumed to be innocent until their guilt is established to your satisfaction to the exclusion of a reasonable doubt. That presumption of innocence starts with them, and each of them, at the outset of the trial and continues with them throughout the trial and if on the whole case you have a reasonable doubt of their having been proven guilty, then you should find those defendants or that defendant to whom you entertain such reasonable doubt not guilty.

The term "reasonable doubt" may be considered as I shall read it to you from this statement which I give here as a statement of law.

The defendants on trial in this case must be proven guilty by evidence offered by the United States, which has the burden of proof to establish the alleged guilt of the Defendants on trial in this case and the burden the Government assumes in the beginning and carries throughout to the end, until it has met it by showing to you the guilt of the Defendant, beyond a reasonable doubt. The Defendants,

having entered pleas of not guilty, are deemed to be innocent. This presumption of (T. 853) innocence attends and prtoects the Defendants throughout the trial, until it has been met and overcome by evidence produced by the Government which shows and establishes the Defendants' guilt, beyond a reasonable doubt.

A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, the jurors do not feel convinced that a defendant is guilty of the charge. A defendant cannot be convicted upon mere suspicion, conjecture or speculation on the part of the jury.

In the present case, the burden of proof is upon the Government to establish every part of its case, beyond a reasonable doubt, and if any part of it, you are left in doubt, the Defendants or any one of them are entitled to the benefit of doubt and must be found not guilty or acquitted.

In other words, a reasonable doubt is best defined by a use of the term itself. A reasonable doubt is a doubt based upon reason, not some inconsequential doubt that might flit through the mind of a juror, not some slight mental hesitation, but a doubt for which there is reason, such doubt as might guide you in determining the more important or every day affairs of your own (T. 854) existence. The United States is required to prove its case beyond a reasonable doubt; it is not required to prove its case beyond all doubt. Few things are capable of proof to absolute certainty and if it were required that the United States should remove all doubt from the minds of each of twelve jurors before a conviction could be had, it would be practically impossible to enforce the criminal laws. And while the defendant is protected, as I say, by the laws which requires the United States to prove its case beyond a reasonable doubt, it is not an irrational doubt, it is not an unreasonable doubt, but a doubt for which there is reason. If you have such a doubt, then you should find the defendant or the defendants, or that defendant as to whom

you entertain such doubts not guilty. If you do not have such a doubt, it is your duty to find them guilty.

A unanimous verdict is required. You will elect one of your number foreman and the foreman will sign the verdict for the jury. You cannot arrive at your verdict by holding a primary election or taking a majority or any other percentage of the jurors, but it must be the verdict of each juror. Our system of justice presumes that twelve (T. 855) disinterested citizens of a given community or district, who know nothing about the case that they are called upon to try, never heard of it, know nothing of the defendants or have no particular interest in protecting or offending any of the accused, that twelve citizens can sit together under identical circumstances and hear witnesses testify, have the whole atmosphere of the trial in the case, hear the respective arguments, on the respective sides and the instructions given by the Court, and by discussing that together, the evidence and the facts of the case together, can arrive at a fair and a just decision.

Consequently, it is presumed that intelligent and disinterested citizens who sit upon a jury will approach the determination of a very serious problem. This is a serious case, it is serious for the defendants, it is serious for the United States, not to be taken lightly, and when you go to your jury room you are instructed that you should give due regard to the reasoning, recollection, arguments, discussion of your fellow jurors.

I have never sat on a jury but I have known people who have and I have been told (T. 856) that at times you go to the jury room and some one or more of the jurors will immediately announce what the verdict should be and they will stay there all day or all night, or some other extravagant statement, mistaking I am afraid hard-headedness and stubbornness for strong-mindedness. So when I say that the verdict is to be unanimous, that means that it should be the verdict of each juror but you should not reach a quick decision or take an arbitrary or uncompromising stand until

you have given the case full consideration in the light of the discussion among your fellow jurors.

You have to realize, of course, that it is important to decide this case. The United States Attorney has discharged his duty, the defense counsel has discharged their duties, the regular attaches of the Court have gone about and discharged their functions here. I am giving you the instructions of the law and it will be your duty if you can conscientiously do so under the law to decide the case. I do not mean to suggest that you should forego your own convictions in any sense, although you may be the only juror that sees the case as you see it and you have a duty to adhere to that conviction if it is arrived at after (T. 857) consideration, as I have outlined those steps, even though your fellow jurors may not agree with you. However, you are to also realize that there are twelve people on the jury and the system anticipates that twelve people, as I say, can possibly with some resilience on the part of all of them, make a conclusion of the case.

The indictment in this case is composed of nine separate counts. A count in an indictment is a separate charge. In other words, this could have been nine different indictments. Instead of that it was brought in one indictment, in nine different counts or charges. And so you will treat each count separately as it applies to each defendant. I will give you a form of verdict here which will make it an acceptable method whereby you may express yourself. You are not going to have to do an awful lot of writing or anything of that kind, but you are to treat each defendant separately, determine his guilt or his guilt on each count of the indictment separately.

The indictment itself is not of any evidential value; it is merely the charge. The United States is put upon the responsibility of proving all of the allegations in this indictment. (T. 858) The defense is not required to offer proof of anything. The responsibility rests upon the United States after a plea of not guilty, which has been entered in this case, to each count of this indictment, by each of the defendants, thereby categorically denying the charges set forth

in the indictment. You are not to say or assume that because there is an indictment that that of itself is some evidence of guilt; it is not and is not to be so treated.

Now, the matter of penalty in the federal courts is different from the state court. Possibly some of you have served on juries in state court. In the criminal trial in state court the jury determines the guilt or innocence of the accused and if the defendant is found guilty, if they find that the defendant is guilty, make that as their verdict; then they have the further responsibility of fixing the penalty. Now, in the federal courts that is not the law. Your responsibility stops when you determine the guilt or innocence of each of these defendants as it pertains to each count in the indictment. The matter of penalty addresses itself entirely to the trial judge, who in the light of his knowledge, experience, various methods by which he qualifies (T. 859) for that function, fixes the penalty. And so when you have decided the defendant is not guilty, if you do decide that as to any of them, then that concludes that case as to that defendant. If you decide that any or all of the defendants are guilty, then you have concluded your work as a juror and the matter of penalty addresses itself to the trial judge.

In the federal court it is the privilege and some time the duty of the trial judge to comment on the evidence. I do not propose to do that to any great extent, at least, but if I should you are not to accept what I may say as all of the evidence in the case. I certainly will not presume to review all of the evidence in this case of these past two weeks. You are not to accept what I may say as all of the important evidence or all of the important evidence on a given point. You may not accept what I will say, if I do refer to the evidence, as necessarily true. I would not intentionally make a misstatement, but you are the triers of the facts and it will be for you to determine what the evidence is and what reasonable inferences may be drawn from it.

The law considers two types of (T. 860) evidence, direct evidence and circumstantial evidence. In this case the essential facts to be established to your satisfaction to the exclusion of a reasonable doubt start out with the proposition that this was an interstate transaction. That is what makes it a federal case, that is, it is charged in this indictment that these defendants either did this themselves or caused it to be done, to transport these films in interstate commerce from some place outside of the Eastern District of Kentucky and outside of Kentucky into the State of Kentucky and into this District. Now, naturally, as I think it has been referred to here, the United States cannot produce – at least it hasn't produced – and it would be impossible, I assume, for it to produce a witness who actually saw these films being brought across the river from Ohio or any place else into Kentucky. And so, of course, if someone was seen carrying this film, with the name of the film "Deep Throat" and these other names on it, carrying it across the river, that would be direct evidence.

And so, the United States not having that kind of witness must rely on what is known as circumstantial evidence. Circumstantial (T. 861) evidence may be just as strong as direct evidence if you believe from the surrounding facts and circumstances that it establishes the fact. So you are advised that direct evidence is where a witness testifies to what he saw, heard or observed, what he knows of his own knowledge, something which comes to him by virtue of his senses.

Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind. Stated somewhat differently, circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a logical tendency to lead the mind to a conclusion that those facts exist which are sought to be established.

Circumstantial evidence, if believed, is of no less value than direct evidence for in either case you must be convinced beyond a reasonable doubt of the guilt of the defendant or defendants.

That is about all there is to circumstantial evidence. You infer, on the basis (T. 862) of reason and experience, from an established fact, the existence of some further fact. There are times when different inferences may be drawn from the facts. Whether they are proved by direct or circumstantial evidence, the government asks you to draw one set of inferences, while the defendant asks you to draw another. It is for you to decide, and for you alone, what inferences will be drawn.

Now, in the law one who aids or assists another in the commission of an offense is equally guilty with the principals. So you are instructed this statute applies in this case and it is a proper instruction to give to you:

> "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "Whoever willfully causes an act to be done which is directly performed by him or another would be an offense against the United States, is punishable as a principal."

It is not necessary for the (T. 863) Government to show that each defendant physically committed the crime himself. Section 2 of Title 18, United States Code, provides that a person who aids and abets another to commit an offense is just as guilty of that offense, as if he committed it himself. Accordingly, you may find beyond a reasonable doubt that one defendant committed the offense and that the other defendant aided and abetted him.

To determine whether a defendant aided and abetted the commission of an offense, you ask yourselves these questions:

Did he associate himself with the venture? Did he participate in it as something he wished to bring about? Did he seek by his action to make it succeed? If he did, then he is an aider and abettor.

Now, this ninth count in the indictment charges a conspiracy. The law provides as follows, and I will read it to you:

> "If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each is guilty of an offense against the United States."

(T. 864) Now, I know "conspiracy", the term sounds legalistic, but it is very simple. It is an everyday term. We all generally know what a conspiracy is, a combination of more than one person, two or more people, combined to carry out a given purpose, a very terse definition of conspiracy in the law is: a conspiracy is an agreement between two or more persons to commit an unlawful act or to commit a lawful act in an unlawful way.

Now, the conspiracy charged in this indictment is that these defendants, all four of them, or all five of them, the individuals and the corporate defendants, entered into a conspiracy. That does not mean that the United States has to show that they sat down around the table and drew up a formal document or by discussing said, "We will all form a conspiracy and we will do this, that and the other to effect a violation of this statute by transferring from one state into this District in Kentucky a film which is made unlawful by law." That would be the perfect conspiracy if you had some eye witness to prove that that was done. Naturally that is a little extreme. And so the United States (T. 865) must rely on numerous, or how many you may think they have established here, facts and circumstances to show that these five defendants had a meeting of the minds, even though they

may never have gotten together and actually formed the conspiracy as such; but if you believe that throughout this period of time as named in the indictment they arrived at a common understanding for this film to be sent from the corporate defendants and the personal defendants in Michigan to this district in Kentucky, to Cinema X Theatre, or to Mr. Marks, and that he was to show it and that they were to thereby to receive remuneration for it, whatever it may be, much or little, and if you believe that there are sufficient facts and circumstances to show that they had a meeting of the minds and that some one act or more acts, but at least one, was done by any member of the conspiracy to carry out its objects and purposes and was done during the life of the conspiracy, then that completes the charge.

Now, I don't want to compound or rather obscure what might be a rather obscure situation and I will give you an illustration. Let us assume that three people would agree among (T. 866) themselves to rob a bank. That doesn't mean that they all had to sit down, as I say, and draw up a formal instrument that they were going to do it, but they had a common understanding and that one was to get an automobile and one was to make a plan of get away, and so forth. If nothing was ever done, if they just had that meeting of the minds and that was the end of it, no act was ever done to carry out the object and purpose of the conspiracy, then no one is guilty of anything. But if one was supposed to go and get an automobile and he went and got an automobile, even though the bank was never robbed, the conspiracy has been formed and there was an unlawful act committed by all three of those defendants.

What the United States says here is that these defendants had this agreement and they carried it out by sending this film into this district and that each of them had some particular function. They name in this indictment, they set out what are called overt acts or acts which are alleged to have been committed by the conspirators, either individually or collectively, and at this point I do want to call your

attention to Overt Act No. 7. I did this before, but I will do it again so you won't (T. 867) overlook it, which is not to be considered by the jury. Leave out that overt act. It has not been established and it is not to be considered. I mean there is no evidence. I am not saying that any of them have been established, but I am saying that there has been no evidence and the Court ruled as a matter of law that an Overt Act No. 7, which states:

> "That on or about some date to the Grand Jury unknown, but between the dates of January 15, and February 27, 1973,
>
> STANLEY MARKS DBA CINEMA X THEATRE
> HARRY MOHNEY
> GUY WEIR
> AMERICAN AMUSEMENT COMPANY, INC.
> AMERICAN NEWS COMPANY, INC. AKA
> AMERICAN NEWS DISTRIBUTING COMPANY
>
> knowingly transported and caused to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of an obscene, lewd, lascivious and filthy film preview entitled, "Memoirs Of A Madam" for the purpose of the sale and distribution of said film."

(T. 868) Now, that was never established, there was no evidence on that point, so you are not to consider that overt act. You may consider all of the other overt acts set out in the indictment under this conspiracy Count 9.

Four essential elements are required to be proved in order to establish the offense of conspiracy charged in the indictment:

First: That the conspiracy described in the indictment was willfully formed, and was existing at or about the time alleged;

Second: That the accused willfully became a member of the conspiracy;

Third: That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and

Fourth: That such overt act was knowingly done in furtherance of some object or purpose of the conspiracy, as charged.

If the jury should find beyond a reasonable doubt from the evidence in the case that existence of the conspiracy charged in the indictment has been proved, and that during the (T. 869) existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy offense charged is complete; and it is complete as to every person found by the jury to have been willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Now, one other thing I do want to point out to you here. I made the statement to you during the progress of the trial, but I will state it to you again. Any statement made by a member of a conspiracy, even though in the absence of his co-defendant, or co-conspirators, may be considered as

evidence against all of them if it is made during the life of the conspiracy and in furtherance of its object and purposes. Otherwise, until you believe the conspiracy has been formed, (T. 870) you must put that test to it: Was there a conspiracy? If you decide that there was then you have a right to consider the statement that was made by any one of the alleged conspirators, even though his co-conspirators may not have been present at the time.

Possibly, by way of review – this is a little repetitious, but I don't want to overlook the proper instruction, so I will give it to you again.

A conspiracy is a combination of two or more persons, by concerted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of "partnership in criminal purposes", in which each member becomes the agent of every other member. The gist of the offense, is a combination or agreement to disobey, or to disregard, the law.

Mere similarity of conduct among various persons, and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

(T. 871) However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, slated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. What the evidence in the case must show beyond a reasonable doubt, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not establish that all the means or methods set forth in the indictment were agreed upon to carry out the alleged conspiracy; nor that all means or methods, which were agreed upon, were actually used or put into operation; nor that all of the persons charged to have been members of the alleged conspiracy were such. What the evidence in the case must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed, and that one or more of the means or methods described in the indictment were agreed upon to be (T. 872) used, in an effort to effect or accomplish some object or purpose of the conspiracy, as charged in the indictment; and that two or more persons, including one or more of the accused, were knowingly members of the conspiracy, as charged in the indictment.

In your consideration of the evidence in the case as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed, as alleged in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not the accused willfully become a member of the conspiracy.

In other words, if you should determine that the conspiracy existed, as I stated a few minutes ago, you should then determine whether or not each one, each member, taking up each alleged defendant, each alleged member, each of the defendants, you are to determine whether that particular defendant was actually a part of it.

If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was willfully (T. 873) formed and that the (a) defendant willfully became a member of the conspiracy either at its inception or afterwards, and that thereafter one or more of the conspirators knowingly committed one or more of the overt acts charged in furtherance of some object or purpose of the conspiracy, then there may be a conviction even

though the conspirators may not have succeeded in accomplishing their common object or purpose and in fact may have failed to do so.

The extent of any defendant's participation, moreover, is not determinative of his guilt or innocence. A defendant may be convicted as a conspirator even though he may have played only a minor part in the conspiracy.

An "overt act" is any act knowingly committed by one of the conspirators, in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature, if considered separately and apart from the conspiracy. It may be as innocent as the act of a man walking across the street, or driving an automobile, or using a telephone. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme, and (T. 874) must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

If from all the evidence and the reasonable inferences therefrom, you believe beyond a reasonable doubt that two or more of the individuals or corporations charged in Count 9 of the indictment in this case, did in fact conspire to violate a law of the United States, then I charge you that all those so found may be convicted of any substantive offense in Counts 1 thru 8 of this indictment, committed by any one of them, pursuant to the conspiracy set out in Count 9, if you believe beyond a reasonable doubt, from all the evidence, that any one of them did any of the substantive crimes charged in Counts 1 thru 8 pursuant to the conspiracy.

Now, members of the jury, we have had in this case numerous witnesses, some of whom have been offered to you as expert witnesses and you are instructed that witnesses are to be weighed and not counted. Weight does not depend upon having the greater number of witnesses. You may believe one witness against many. The jury determines the weight to be given (T. 875) the testimony of the witnesses by their

demeanor on the stand, their interest in the case, the facts bearing on their credibility, their intelligence and knowledge, their prejudice and interest, if any, and not by their number.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses". Witnesses who, by education and experience, have become expert in some area, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

Now, some of the defendants in this (T. 876) case, two of the defendants, are corporations. A corporation is a legal entity, or person, and a corporation may be found guilty of a criminal offense. A corporation is a creature of statute; it is not an individual, but it is only operated and controlled by humans, by individuals. A corporation itself is a separate entity. So, consequently, a corporation may violate the law, as an individual, but it must do it through its authorized agents and officers and directors.

A corporation of course may only act through natural persons, who are known as its agents. In general, any agent or representative of a corporation possessing adequate authority may bind the corporation by his acts, declarations and omissions. In order to find a corporation defendant guilty, you must find that all of the essential elements of the offense, as set out in these instructions, are present as to the

corporation within their authority. The scope of authority of these agents is a question of fact for you to decide just as other fact questions in the case.

Just as in the case of an individual defendant, the burden in on the Government to establish the guilt of a corporate defendant beyond (T. 877) reasonable doubt.

As a general rule, whatever any person is legally capable of doing himself can be done through another as agent. So, if the acts of an employee or other agent are voluntarily and intentionally ordered or directed, or authorized or consented to by the accused, then the law holds the accused responsible for such acts, the same as if the acts had in fact been done by the accused.

A stockholder or director of a corporation may not be held criminally liable for specific acts of his corporation, performed through its employees, unless he actually and personally performed the act which constitutes the offense or the act was done at his direction or with his permission. Consequently, the Defendant, Harry Mohney, as a stockholder or director of the Defendant corporation, may not be found guilty of the offenses alleged unless the Government has proved beyond a reasonable doubt that the publication charged as being obscene, was transported or caused to be transported in Interstate Commerce at the direction of the stockholder or director.

(T. 878) In other words, a person can't be held accountable for something that the corporation does if it is unknown to him, although he is responsible for the conduct of the business of the corporation. He naturally does not do all of these things himself. Corporations act through agents and if he knew it was being done, if it was done with his approval and assent and acquiescence, it is considered to be by his direction since he was in charge of what the corporation did or had a part in its acts and he may be, if you believe that he acquiesced, with his knowledge and

consent and acquiescence and approval, and you believe that fact, as I say, to the exclusion of a reasonable doubt, then he may be found guilty for the corporation.

You have been instructed on the basis of how a corporation can be held criminally liable on a charge of obscenity as set forth in the indictment; that is, only through its officers and agents under conditions which I have stated. This does not mean that the officers and agents may be cleared of wrongdoing in the event the corporation is found guilty. The officers and agents, such as Mr. Weir and Mr. Mohney, may also be held (T. 879) accountable and thereby personally guilty of wrongdoing and if you believe from all the evidence or reasonable inferences that may be drawn from the evidence, to the exclusion of a reasonable doubt, that these defendants, Weir and Mohney, or either of them, knowingly and intentionally, either acting personally or causing another or others to act to effect the transportation of obscene films in interstate commerce from outside the State of Kentucky to this Eastern District of Kentucky for the purpose of sale or distribution, they may be found to be individually and personally guilty as charged in this indictment, treating them not collectively and not together, but each one of them and applying the rules of law as I have given them to you, to each of them.

You will note that the indictment charges the defendants with knowingly transporting or causing to be transported in interstate commerce certain obscene films for sale of distribution and that these were transported from Michigan, Ohio, and other states. You are instructed that the statute involved, 18, U.S.C. 1465, prohibits transporting such obscene films in (T. 880) interstate commerce for sale or distribution. Thus, it is not necessary that the United States prove that the films were shipped from both Michigan and Ohio and some other state into Kentucky, so long as it is proven that the films were shipped from another state into Kentucky and that the defendants or any of them caused them to be transported into Kentucky from one of those other states.

In other words, even though you may believe that they were sent by the defendants or some of them, even though they came in a round about way, it doesn't mean that they came necessarily direct but were sent from out of this district, out of state into this district, into Kentucky. I don't think you will have any difficulty about sale or distribution. That doesn't mean that they have to be pedaled out. The sale of the film is accomplished if it is shown and money is taken from patrons to see it. That is a sale and distribution of the film. It doesn't mean that they have to go around and distribute it among people, but the sale and distribution is achieved if they put it into commerce by showing it at the theater, if you believe that they did that for (T. 881) money, or not necessarily for money, but that is the charge in the statute, for sale or distribution.

The term "interstate commerce" includes commerce between one state and another state. I think you understand that.

If you find that the motion picture film "Deep Throat" was transported between some other state and Kentucky on the occasions alleged in the Indictment, then I charge you that the interstate commerce element of those Counts has been satisfied.

By transportation of the film for the purpose of sale or distribution is meant transportation for commercial gain or exhibition to others as opposed to a purely private viewing by the transporter.

If you believe from all the evidence that the movie, "Deep Throat" or any other of the films in the indictment were made in a state outside of Kentucky and were then found in possession of a theater or person in this state, you may draw the inference if you so believe that any such film has been transported in interstate commerce.

The essential elements required (T. 882) to be proved beyond a reasonable doubt in order to establish the offenses charged in the indictment are as follows:

1. That on or about the dates set forth in the indictment in Counts 1 thru 8, the defendants transported or caused to be transported in interstate commerce from some state outside of Kentucky into Kentucky an obscene film for the purpose of sale and distribution.

2. The defendants had knowledge of the nature or character of the contents of the film at the time it was transported in interstate commerce and knowledge of the interstate character of the shipment.

3. The defendants knowingly transported or caused to be transported in interstate commerce an obscene film for the purpose of sale and distribution.

4. The average person, applying contemporary community standards, would find that the film, taken as a whole, appeals to one's prurient interest in sex.

5. That the film depicts or describes, in a patently offensive way, sexual conduct, including but not limited to ultimate (T. 883) sexual acts, normal or perverted, actual or simulated, masturbation, excretory functions, and lewd exhibition of the genitals.

6. That the film, taken as a whole, lacks serious literary, artistic, political, or scientific value.

These last three elements constitute the judicially determined definition of obscenity.

Counts 1 thru 9 of the indictment includes the words of the statute, namely the adjectives "obscene", "lewd", and "lascivious", but the gist of the offenses alleged in those counts are that the Defendants knowingly and willfully caused

to be transported an obscene film in interstate commerce for purpose of sale or distribution.

The best of whether the film is obscene is as follows: Whether to the average person, applying contemporary community standards, the film taken as a whole appeals to the prurient interest.

Under this definition, three elements must exist: (1) whether the average person, applying contemporary community (T. 884) standards would find that the film, taken as a whole, appeals to the prurient interest in sex; (2) whether the film depicts or describes, in a patently offensive way, sexual conduct, including but not limited to ultimate sexual acts, normal or perverted, actual or simulated, masturbation, excretory functions, and the lewd exhibition of the genitals, and (3) whether the film, taken as a whole, lacks serious literary, artistic, political or scientific value.

The first test to be applied in determining whether the film charged herein is obscene is whether the average person, applying contemporary community standards would find that the film, taken as a whole, appeals to one's prurient interest in sex.

A "prurient interest" is an inordinate, shameful, morbid, degrading, unhealthy and unwholesome interest in sex and in details concerning sex. A film which appeals or panders to an interest in sex that can be described by those adjectives appeals to prurient interest. This does not mean that a film can be said to appeal to prurient interest merely because it describes an activity of which you disapprove. It is not the (T. 885) matter that the film describes, but the manner in which it describes it, that determines whether it is to be condemned. If the film is calculated, by the physical actions that it describes and depicts and the detail and manner and such description and depiction, to appeal to and excite in the viewer shameful, morbid, degrading unhealthy or unwholesome interests, thoughts or desires, you can find that

it appeals to prurient interest. This judgment must of course be made in light of contemporary community standards as applied by the average person with an average and normal attitude toward an interest in sex. If you conclude that the detail and manner of description goes beyond that which the average person would consider a normal interest in sex and appeals instead to an inordinate, shameful, morbid, degrading, unhealthy and unwholesome interest, and that to the average person the degree of this appeal offends community standards, and if you arrive at this conclusion beyond a reasonable doubt, you should find that the film appeals to prurient interest and is obscene.

The "average person" is, of course, a hypothetical person. The phrase means (T. 886) a person with an average interest and attitude toward sex: not a libertine, not a prude, not a person who is preoccupied with sex, not a person who rarely if ever thinks about sex, not a person who thinks sex is the most important thing to be discussed. The phrase means a normal individual of average sex instincts; not one who is oversexed, not one who is under-sexed, not one who thinks sex is the most important factor in life, and not one who is afraid of sex or repelled by sex or ignorant of sex or bored by sex. The phrase means, in short, a normal, healthy, average adult man or woman with normal, healthy, average attitudes, instincts and interests toward sex.

The Court has charged you that one ingredient of "obscenity" is the appeal of the press materials to prurient interest. "Prurient" is a word that may mean different things to different people. Under the law herein, a prurient interest is only a shameful or morbid interest in sex, nudity or excretion. Press materials do not appeal to a prurient interest if the average viewer today can view the publication candidly, openly and with the normal interest in (T. 887) sex which all persons presumably have in greater or lesser degree.

The explicit depiction of sex or sexual activity is not synonymous with obscenity. You may find such explicit

depictions ugly or repulsive and it would still be your duty to find them not obscene if they do not meet the legal test of obscenity that I have given to you.

The second test to be applied in determining whether the film is obscene, is whether it depicts or describes, in a patently offensive way, sexual conduct, including but not limited to ultimate sexual acts, normal or perverted, actual or simulated, masturbation, excretory functions and lewd exhibition of the genitals.

In applying this test, you must consider the film as a whole and not part by part. You must measure the film by contemporary or current local community standards and determine whether the film so exceeds the limits of candor in the description or representation of sex, so as to be patently offensive. In other words, if you find the film patently offensive because it affronts contemporary community standards relating to the (T. 888) description or representation of sex, then, if you find the other elements of these crimes to exist, you may find Defendants guilty.

"Contemporary community standards" means the standards generally held throughout the Eastern District of Kentucky. We are not measuring this term "contemporary community standards" directly with what happened in Newport or on Monmouth Street, but it includes the whole Eastern District of Kentucky. You people on the jury are from different parts. Some of you are from Newport, Campbell County, maybe Monmouth Street, I don't know; others of you from out in Boone County, some in Bracken, some in Mason. This District extends to sixty-seven counties in Kentucky, goes throughout the whole eastern district of Kentucky, as I explained that to you when you qualified as jurors. So you are not to say, "Well, a thing like that wouldn't offend a person or even be obscene maybe under some conditions, but on the other hand, there are things we know to some people more prudish that even something of less significance then might be drawn from these films would

be considered obscene. So I think you pretty generally under-
(T. 889) stand, but I don't want you to say, "Well, that doesn't offend anybody where they had this theater," or, "They wouldn't have to do to see it." That is not the point. The point is whether or not it is of such a nature that you believe in light of these instructions which I have given you, in light of the evidence, that this film is obscene because it offends contemporary community standards, contemporary community standards being the neighborhood of the Eastern District of Kentucky concerning sex, judged by the average person in this community as I have defined it to you. The phrase means, as it has been aptly stated, "the average conscience of the time" and "the present critical point in the compromise between candor and shame at which the community may have arrived here and now." You, the jury, are the sole judges of the contemporary community standards of the Eastern District of Kentucky. Although you may consider expert testimony on the subject of community standards, if offered by either side, expert testimony is not necessary. You may give such expert testimony whatever weight you think it deserves or disregard it entirely. The determination rests with you – not (T. 890) with any expert. In arriving at and applying your judgment, however, you are not to consider your own standards of what is good and bad. You are not to condemn by your own standards, if you know and believe them to be stricter than those generally held, and you are not to exculpate or excuse by your own standards, if you know and believe them to be more tolerant than those that are generally held.

That business of an "average person" is necessarily vague and I am not sure if there is such a person who might be considered average in the Eastern District of Kentucky, or any other community in our country or in the world. That must necessarily be a very vague term, but it is the best that the law can provide and it does have a significance of meaning which all of us generally, I think, understand, not an

extremist in either sense, in any way, but a person who might be representative of this district.

If you find that the films in this Indictment exceed substantially the limits of candor in the description or representation of sex which is acceptable in the Eastern District of (T. 891) Kentucky, then you may find the film to be patently offensive.

In determining contemporary standards, you should take into account such things as dress styles, which include hot pants and see-through blouses; topless and bottomless bars; adult theaters which exhibit films dealing candidly with sex matters; adult book stores which sell publications containing pictorial and verbal portrayals dealing with sex; adult motion picture theaters which display films containing explicit, sexual conduct.

(T. 892) Your own personal and social views on the press materials charged as obscene in the indictment may not be considered. Thus, whether you believe that the press materials are good or bad is of no concern; so too, you may not consider whether in your opinion the press materials are moral or immoral; whether they are likely to be helpful or injurious to the public morals. Similarly, whether you like or dislike the press materials, whether they offend or shock you, may not be considered by you. You may think the press materials are immoral, shocking or offensive, and you must acquit the defendants if the press materials are not obscene, as the Court has defined that term for you.

The third test to be applied is whether the film lacks serious literary, artistic, political, or scientific value. Now, if you believe that this film lacks serious literary, artistic, political or scientific value, or whether it does have those adjectives, serious literary, artistic, political or scientific value it is not obscene, but if it lacks those, that is the exception that is taken out of this. You can determine if those

adjectives as I have read them to you are (T. 893) to these films; then it is not obscene within the meaning of the law.

Obscenity is excluded from constitutional protection because it is without serious social importance. Obscene utterances are no essential part of an exposition of ideas and are of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Of course, the mere fact that a film deals with sex does not mean that it cannot have value to society. Indeed, such a film can have social importance if it portrays sex in a manner that advocates ideas or that has literary, scientific, political or artistic value. It is for you to determine whether the film in issue in this case is of such value to society. If you find that it lacks serious literary, artistic, political, or scientific value, you can brand it obscene. If you find that it does have those, one or more of those adjectives that I have given you, then you should determine that it is not obscene.

"The film when taken as a whole" means that you are to view each film in its entirety. You are to judge the film as a whole (T. 894) on the basis of its total effect and not on the basis of isolated passages or sequences. Thus, the film is not to be condemned merely because it contains passages or sequences that are descriptive of sexual activity, nor is it to be exculpated or excused despite containing such descriptive passages or sequences merely because it has a plot, tells a story, purports to point out a moral or deliver a message, or contains passages or sequences that are descriptive of other than sexual activity. You are to weigh the total effect of the film and determine what is its main thrust. You must decide whether the sexually descriptive content of the film outweighs, or is subordinate to, all other content. You must determine whether the descriptions or depictions of sexual activity merely illuminate and support the story told or the message delivered by the film or whether the message; story and other incidents of the film are merely accessory to and

provide a format or setting for the descriptions or depictions or sexual activity.

You are instructed as a matter of law that it is not necessary for the Government to prove that the films in the indictment were (T. 895) exhibited to juveniles or unwilling adults before you can find it obscene.

All that is necessary for you to find the film obscene is: that the average person applying contemporary community standards of the Eastern District of Kentucky would find that the film, taken as a whole, appeals to the prurient interest in sex; that the film depicts or describes in a patently offensive way sexual conduct; and that the film, taken as a whole, lacks serious literary, artistic, political or scientific value.

The First Amendment to the Constitution of the United States guarantees freedom of speech and press. It is a basic guarantee of the First Amendment that one is free to advocate ideas. With respect to the nature of ideas, they may be of the widest variety, including the unorthodox, the controversial, or even ideas hateful to the prevailing climate of opinion, but unless they are integrated with unlawful conduct, such ideas have the full protection of the guarantees of the First Amendment.

The guaranty of the Constitution is not confined to the expression of ideas that are conventional or shared by a majority.

(T. 896) Liberty of circulation is as essential to freedom of the press as liberty of publication; indeed, without the circulation, the publication would be of little value. This circulation of press materials would be protected by the First Amendment to the same extent as the printing and publication thereof.

You are instructed that it is entirely irrelevant that a Defendant may have intended to make a profit from the

transportation of the press materials involved in this case. That fact is immaterial as is the fact that daily metropolitan newspapers, films and books are sold or exhibited for a profit in our free enterprise system.

No media of communication including publications such as are involved in this case, may be deemed obscene merely because they are distributed or sold commercially.

The Government must prove beyond a reasonable doubt that the Defendants acted with knowledge before there may be a conviction. This is to insure that no defendant will be convicted because of innocent mistake, accident or inadvertence, the requirement of (T. 897) knowledge applies both to the placing of the film in interstate commerce and to the contents of the film.

It is not necessary for the Government to prove that the Defendants, had actual knowledge concerning, or actually directed the specific shipment named in the indictment. It is sufficient to show that the Defendants knew their business was carried on between states and that they participated in the operation of the business.

In considering whether or not the Defendants, had knowledge of the contents of the packages, you may consider all pertinent evidence in the case. You may consider all of the circumstances in the case, and all inferences reasonably drawn from the evidence to determine whether or not the Defendants, acted with knowledge.

You must be satisfied beyond a reasonable doubt that the Defendants, were in some manner aware of the character or nature of the film alleged to be transported in interstate commerce. The belief of the Defendants, as to the obscenity of the film is irrelevant. If you find – you are the ones that are going to determine (T. 898) its obscenity, so they cannot say, "I shipped it but I didn't know it was obscene." That is

not a defense. If they knew they were shipping it or knew it was being shipped, if it is determined that it is obscene that identifies the guilt of the accused in violating this statute. If you find that the Defendants knew what they were doing, their personal belief that they were not violating the law is no defense.

The Indictment charges a serious crime which requires proof of specific intent before a defendant can be convicted. "Specific intent", as the term implies, means more than the general intent to commit the act. To establish specific intent, the Government must prove, beyond a reasonable doubt, that a defendant knowingly did an act which the law forbids.

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a defendant's intent from the surrounding circumstances. You may consider any statement made, or acts done or omitted by a defendant, and all other facts and circumstances in evidence which indicates his state (T. 899) of mind. It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

It is your duty to give separate consideration to the charges against each corporate defendant and against each individual defendant. You may find all of the defendants guilty, or all of the defendants not guilty, or some guilty and some not guilty, all as the facts found by you warrant.

The verdict must represent the considered judgment of each juror. It is your duty, as jurors, to consult wity one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each juror must decide the case for himself or herself. A juror is not required to surrender honest convictions as to the weight, effect, or lack of evidence solely because of the opinion of a fellow juror, or for the mere purpose of returning a verdict.

A jury which is conscientiously unable to agree on a verdict is just as much a safeguard for liberty and justice as one which has (T. 900) reached a verdict. A juror is never requred to sacrifice his or her conscientious scruples for the sake of reaching agreement.

You will note the indictment charges that the offense was committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

Now, members of the jury, I feel in a sense I should apologize to you for giving you these extended instructions, but as I stated at the outset there are cases, of which this is one, in which it is necessary to state definite rules of law to guide the jury in arriving at its verdict. It is not what might be termed a simple case, although the thing you are to decide is easy of recognition and in the light of all the evidence you are personally competent and qualified to reach a verdict one way or the other. It is the theory of the Defendants in this case that they were merely acting, showed the film and these films which you have seen here – now, that is the test, (T. 901) after all, in light of all these instructions – you saw these films and you are to decide in this case what those films are in light of those instructions, whether or not you believe they are obscene. It is the theory of the defense that they are not obscene, and that under the statutes these films are not filthy films, are not lewd or lascivious or obscene, that they have value as I have outlined that to you, that they have literary, artistic, political or scientific value and that they are not of such a nature that they can do anybody any harm or that they can harm the community and that they are without the contemplation of the Congress in enacting this statute. That is the position of the Defendants, that they are innocent of wrong-doing.

In the first place, they say that the interstate nature has not been proven, the evidence that has been offered in that regard was inconsequential and that the United States has not established that it was an interstate transaction. If you believe that it was not an interstate transaction, that ends the case. You have to find that it was interstate. The Defendants say they haven't proved that to the exclusion of a reasonable (T. 902) doubt. The Defendants say, as I say, that these films are not obscene and they do not offend the average person with contemporary community taste, or that they are not offensive to such a person; and that therefore they have done no harm, that they have had no part in doing wrong and that they should be found not guilty.

The United States, on the other hand, says that by the very showing of these films, they show a lack of literary, artistic, political or scientific value of any kind, that they are pure filth and that they are the kind of thing that this statute was passed to keep from being shown in the community. The law makes a distinction by saying that apparently from decisions of the court things that might be shown in one community could not be shown in another community. In other words, a visit to a contemporary community, as I say the Eastern District of Kentucky, and more or less leaves it up to the juries, those charged with making such a decision, as to whether or not it violates social ideas of that community taken in the terms that I have outlined it to you, the average person. So you are to decide very simply, you saw the films, you know (T. 903) what they are, not judging them particularly by your own standards, but are they of such a nature that you believe that they offend, as charged in the statute, are obscene to the average person in this Eastern District of Kentucky. If you believe that they do and you believe that the interstate transaction has been established, the United States contends that the evidence clearly establishes that fact to the exclusion of a reasonable doubt and that the Defendants are guilty and that you are to find them guilty. If you do not so believe, you should find them not guilty.

As I say, you may find one of them guilty, the others not guilty, some of them guilty on one count, some of them not guilty, all of them guilty or all of them not guilty. The conspiracy count stands alone. I have given you the definition of that. I think you understand that, a common understanding – I won't go through that again – a meeting of the minds to do these acts and to produce this film in this District from outside the state for the purpose of publication and sale.

Now, members of the jury, I don't believe in complimenting people for doing (T. 904) their duty and so I never go on that theme. I don't like to do a lot of talking from the bench. I am more or less a disciple of Francis Bacon, who said that "An over-speaking judge is no well-tuned cymbal." I have done a lot of talking this afternoon and I feel like I should apologize. You have been very patient and have been throughout this extended trial and it has been extended. It started last Tuesday, I believe, at 10:00 o'clock and has been going ever since with half a day out. As I say, I don't mean to flatter you but I have noticed the close attention which you have given to this whole case and you are to be commended for it.

I am confident that you can, taking this evidence to your room, these exhibits – you don't have to do a minute examination, a thorough audit of all these exhibits – you should look at them and see what they are and identify them in the light of the whole evidence. That doesn't mean that you have to act as a certified public accountant undertaking to make a complex layout. They are there for your examination and you can study them as much as you please for that matter. I don't mean that you shouldn't, you (T. 905) should. Take these exhibits tomorrow in light of the whole evidence, go to your room and see if you can make a verdict in this case.

I'm going to excuse you until 9:00 o'clock tomorrow morning. I will submit the case to you as shortly as I can

thereafter. I want you to go to your jury room. Come to the side door.

Mr. Marshal, keep the courtroom locked and they can go to their jury room until they are called down.

I want to emphasize that you observe all admonitions strictly and I am confident that you will do that. That is especially true about talking to members of your family, which is natural, and most anyone does and you have to guard yourself more in that respect than any other single aspect of the admonition. Don't read anything or listen to any newscast. Just dismiss it from your minds and get a good night's rest and start tomorrow trying to remember. You will get some help from your fellow jurors, so don't get to wondering this. Just wait until tomorrow when you come back and take it up.

One other thing, and that is I (T. 906) want you to stay in a good humor. You know, you get to a certain stage in any long, drawn-out affair, whatever it may be, where your nerves get a little frayed and it is a real test of character, one that doesn't let that overcome them. You know, good-humor is one of the marks of intelligence. It is not the only mark. There are a lot of ill-tempered people who are very intelligent, but it is a mark of intelligence and I am sure that you will observe that. You will all be good friends after this is over. You may form an association and have a reunion. I have seen jurors do that. But bear these things in mind and go and come back tomorrow morning.

You may adjourn court until 9:00 o'clock, after the jury has retired. (Reporter's note: The jurors retired from the courtroom.)

* * * * * * * *

"The Judgments and Opinions of the United States Court of Appeals for the Sixth Circuit are not included herein since they are set forth in the Appendix to the Petition for Writ of Certiorari."

No. 75-708

In the Supreme Court of the United States

OCTOBER TERM, 1975

STANLEY MARKS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-708

STANLEY MARKS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners claim: (1) that it was improper to charge the jury on the obscenity standards of *Miller* v. *California,* 413 U.S. 15, with respect to conduct occurring prior to that decision; (2) that a court of appeals is required independently to view the materials in order to determine whether they are obscene; and (3) that the jury was improperly instructed to apply the community standards of the district in which the trial was held.

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners were convicted of conspiracy to transport obscene materials in interstate commerce, in violation of 18 U.S.C. 371. Petitioners Marks, Mohney, Weir and American Amusement Company, Inc., also were convicted on seven counts of interstate transportation of obscene materials, in violation of 18 U.S.C. 1465. Petitioners Marks, Mohney, and Weir

were sentenced to concurrent terms of 90 days' imprisonment and were fined $2,000 on each count. Petitioner, American Amusement Company, Inc., was fined $2,000 on each substantive count. Each corporate petitioner was fined $5,000 on the conspiracy charge. A divided court of appeals affirmed (Pet. App. A; 520 F.2d 913).

The evidence at trial established that petitioner Mohney incorporated and owned petitioner American Amusement Company, Inc. and petitioner American News Company, Inc. Petitioner Weir was the general manager and president of American Amusement (Exhs. 26, 27, 49). Petitioner Marks ran the Cinema X Theatre in Newport, Kentucky (Tr. 434, 560). The Cinema X was owned by petitioner Mohney (Exh. 2). Petitioner Weir scheduled movies for the theater, and the booking of those movies was accomplished by American Amusement (Tr. 561-566). Employees of the theater were paid by American News (Tr. 122, 437).

The films "Deep Throat" and "Swing High," as well as a number of previews,[1] were shown at the Cinema X in February 1973. The films were supplied by American Amusement and were sent to Cinema X either from Durand, Michigan, or Clarksville, Indiana (Tr. 450, 461-462, 488-489).

The films, which were shown to the jury, often focused on the genitalia. They explicitly depicted individuals, couples, and groups engaging in sexual activities, including masturbation, fellatio, cunnilingus, sodomy, onanism, copulation, and male ejaculation. See Pet. App. A. 3.

---

[1]The previews at issue here are entitled "Teenage Cowgirls," "Black on White," "A Few Bucks More," "Memories of a Madam," and "Doctor's Disciples." See Pet. App. A. 3.

Petitioners presented experts who testified that the films are not patently offensive, that they do not appeal to the prurient interest under contemporary community standards, and that they have serious artistic, literary, and scientific value (Tr. 353-355, 407-410, 745-755, 812-814, 825-835).

1. The offenses occurred prior to *Miller, supra,* but the trial took place after that decision. The jury was instructed that the materials are obscene only if they are patently offensive, appeal to the prurient interest under contemporary community standards of the Eastern District of Kentucky, and lack serious literary, artistic, political or scientific value (Tr. 882-895).

Petitioners contend that the jury should not have been allowed to apply the standards enunciated in *Miller* to conduct occurring prior to that decision. They urge that the standards of *Roth* v. *United States,* 354 U.S. 476, and *Memoirs* v. *Massachusetts,* 383 U.S. 413, should have been applied at the post-*Miller* trial of pre-*Miller* conduct.

There is a conflict among the circuits on this question. Three courts of appeals have held that the Due Process and Ex Post Facto Clauses require pre-*Miller* conduct to be assessed under the *Roth-Memoirs* standards. *United States* v. *Jacobs,* 513 F.2d 564 (C.A. 9); *United States* v. *Sherpix, Inc.,* 512 F.2d 1361 (C.A.D.C.); *United States* v. *Wasserman,* 504 F.2d 1012 (C.A. 5).[2] Although the court

---

[2]In cases tried prior to *Miller,* but which were on appeal when *Miller* was decided, the First and Fifth Circuits held that convictions can stand only if the materials are obscene under both the *Miller* and the *Roth-Memoirs* tests. *United States* v. *Palladino,* 490 F.2d 499 (C.A. 1); *United States* v. *Thevis,* 484 F.2d 1149 (C.A. 5), certiorari denied, 418 U.S. 932. The court in *Palladino* remanded the case for retrial under the combined standards, while the court in *Thevis* independently judged the obscenity of the materials. Cf. *Hamling* v. *United States,* 418 U.S. 87, 101-102, 115-116.

of appeals expressly declined to follow *Jacobs* and *Wasserman*, we submit that there is no reason to resolve this conflict in the present case, since the court of appeals held that the materials here are obscene under both standards (Pet. App. A. 12, A. 15, A. 18). The films fall so squarely within the guidelines applicable both prior to and after *Miller* that petitioners could not have been prejudiced by the instructions given, even if those instructions were erroneous.[3]

Moreover, the application of *Miller* standards to pre-*Miller* conduct does not present an issue of substantial continuing importance, requiring plenary review by this Court. The conflict among the circuits will lose its significance in the relatively near future because most post-*Miller* trials of pre-*Miller* conduct already have taken place. The resolution of the conflict by this Court would have little, if any, effect on future obscenity litigation.

2. Petitioners claim (Pet. 13-18) that the court of appeals was required to view the films in order to make an independent determination that they are obscene. The court of appeals specifically found the materials to be obscene under both the *Roth-Memoirs* and the *Miller*

---

[3]The only portion of the *Roth-Memoirs* criteria that could arguably be of benefit to petitioners would be the social value test. While under *Memoirs* materials could be obscene only if they were utterly without redeeming social value, *Miller* holds that materials can be obscene unless they possess serious artistic or literary value. Implicit in the opinion of the court below is the finding that the materials here are wholly without redeeming social value.

In this regard, we note that in *Miller* this Court observed that the social value test of the plurality in *Memoirs* "drastically altered" the *Roth* test, and that the *Memoirs* standard "has never commanded the adherence of more than three Justices at one time." *Miller* v. *California*, *supra*, 413 U.S. at 21-22, 24-25 (footnote omitted). See also *Hamling*, *supra*, 418 U.S. at 116-117.

tests.[4] We submit that a personal viewing of the films is not a constitutionally-necessary prerequisite to this determination.

The films here are described in considerable detail in the record by the affidavits submitted in support of the application for the search warrant (Supp. R. 4-19). The affidavits not only describe the variety of sexual acts shown in the films, but also describe the "plots" of the films and summarize the narration. The entire content of the materials here was disclosed to the court of appeals, and it is apparent that the court reviewed the descriptive affidavits (Pet. App. A. 3). Because that court was fully apprised of the content of the material, its independent determination that the films are obscene was proper.

Petitioners' reliance on *Clicque* v. *United States*, 514 F.2d 923 (C.A. 5), is misplaced. In *Clicque* the court held that, when accepting a guilty plea in an obscenity case, the district court is required to determine that the materials are obscene as part of its duty to elicit the factual

---

[4]This Court has never held that courts of appeals must make an independent determination that materials are obscene, although three members of the Court have expressed that view. See *Jenkins* v. *Georgia*, 418 U.S. 153, 163-165 (Brennan, J., concurring). Cf. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 343-344. Appellate courts, however, have "the ultimate power * * * to conduct an independent review of constitutional claims when necessary." *Miller* v. *California*, *supra*, 413 U.S. at 25. In light of petitioners' assertion that the *Roth-Memoirs* standard should have been applied, it was appropriate for the court of appeals to make an independent determination that the materials are obscene under that standard. Cf. *J-R Distributors, Inc.* v. *Washington*, 418 U.S. 949, 950 (opinion of Mr. Justice White) ("Obsenity cases, like others, are not immune from the standards generally governing the exercise of our appellate jurisdiction. The Court has never indicated that plenary review is mandatory in every case dealing with the issue of obscenity.").

basis of the plea.[5] In the present case the jury found the films to be obscene, and the court of appeals independently reached that conclusion. *Clicque* and the remaining cases cited by petitioners require no more. The independent appellate review to which petitioners claim they are entitled has been provided.

3. Petitioners claim that the trial court erred by instructing the jury that the community from which to draw contemporary community standards was the location of the trial, the Eastern District of Kentucky. They urge that the standards of Cincinnati, Ohio, also should have been included because the jury was drawn from the nearby Covington, Kentucky, area and because some members of the jury were employed in Cincinnati (Pet. 19-20, 23-24).

The purpose of the community standards formulation, however, is to provide an understandable guideline by which the jury may judge allegedly obscene material. *Hamling* v. *United States, supra,* 418 U.S. at 107; *Miller* v. *California, supra,* 413 U.S. at 33. The instructions here provided that guideline. The films were received and shown in the Eastern District of Kentucky, and the jury was drawn from that district. The instructions defining the Eastern District as the relevant community were therefore proper. *Hamling* v. *United States, supra,* 418 U.S. at 105-106.[6]

---

[5]The defendant in *Clicque* pleaded guilty to a charge of mailing an obscene letter. The letter was not described in the indictment, nor were its contents made known to the district court at the time of the plea.

[6]We note that petitioners were allowed to present evidence of standards prevailing in Cincinnati (Tr. 320-330, 342-343, 813, 822). See *Hamling* v. *United States, supra,* 418 U.S. at 106.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975
NO. 75-708

STANLEY MARKS, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

ROBERT EUGENE SMITH, Esquire
GILBERT H. DEITCH, Esquire
2005 One Hundred Colony Square
Atlanta, Georgia 30361

Attorneys for Petitioners.

Of Counsel:
ANDREW DENNISON, Esquire
216 East Ninth Street
Cincinnati, Ohio 45202

The Paul M. Harrod Company, Baltimore, Maryland 21234

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975
NO. 75-708

STANLEY MARKS, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

Petitioners herein seek a Writ of Certiorari to review a judgment and opinion of the United States Court of Appeals for the Sixth Circuit (520 F.2d 913) which in turn affirmed judgments of conviction entered against the Petitioners in the United States District Court for the Eastern District of

Kentucky. Among the issues presented in the Petition is the propriety of charging the jury on the obscenity standards enunciated in *Miller v. California*, 413 U.S. 15 (1973), when the conduct charged occurred prior to that decision. Among the reasons presented for granting the Writ is the present conflict among Circuit Courts of Appeal on this question.

In its Memorandum of Opposition, the Respondent admits the existence of the Circuit Court conflict. *See* Memorandum for the United States in Opposition, at 3. The Respondent contends that the conflict need not be resolved in this case, however, for two reasons. First, the Court of Appeals held the materials herein obscene under both the *Roth-Memoirs* and the *Miller* standards. Second, the Respondent contends that the conflict among the Circuits is not one of substantial continuing importance.

Respondent's first contention in this regard misses the mark for two reasons. The conclusion of the majority below that the materials are obscene under either standard is of questionable import since no member of that Court ever even viewed the materials. *See* 520 F.2d, at 923 n.1 Additionally, the question here presented does not in any way relate to opinions of the judiciary as to the nature of the materials. The issue here revolves around the instructions given to the jury at trial. Had the jury been instructed on the *Roth-Memoirs* formulation, as it would have been had the case arisen in the First, Fifth, Ninth or District of Columbia Circuits, an acquittal might have obtained and the materials might never have been before the Court of Appeals for review.

The Respondent's second contention is simply incorrect since the question presented is one of continuing and widespread importance.

On January 18, 1976, the United States Court of Appeals for the Tenth Circuit issued a judgment and opinion in *United States v. Freidman*, No. 75-1079. That judgment and opinion affirmed a judgment of conviction entered in the United States District Court for the Western District of Oklahoma for interstate transportation of obscene material in violation of 18 U.S.C. § 1465. *Freidman*, like the instant case, involved pre-*Miller* conduct (occurring on or about December 10, 1970) and a post-*Miller* trial with jury instructions following the *Miller* formulation.

Yet another instance of pre-*Miller* conduct adjudicated in a post-*Miller* trial is presented in *United States v. Carter, et al.*, Cr. No. 72-207, in the United States District Court for the Western District of Tennessee. Though the conduct there involved occurred prior to the *Miller* decision, the jury was instructed, in accordance with the Sixth Circuit Rule for which review is here sought, on the *Miller* obscenity standard. The trial of that case, which involved two individual and two corporate defendants, stretched over three weeks. All Defendants were found guilty and all are now seeking review of their judgments of conviction in the Sixth Circuit Court of Appeals.

As this Brief is being written, yet another substantial case which will be affected by the *Marks'* decision is occurring in the United States District Court for the Western District of Tennessee. The case, entitled *United States v. Gerber, et al.*,

Cr. No. 73-45, involves approximately 20 defendants. The trial has thus far consumed over four weeks, and at least two more weeks thereof appear likely. Though this obscenity case involves pre-*Miller* conduct, under the Sixth Circuit rule, *Miller* jury instructions may be anticipated. If conviction is obtained, a substantial number of appeals would likely follow.

Finally, two further indictments have been returned in the United States District Court for the Western District of Tennessee charging various obscenity violations on the basis of pre-*Miller* conduct. The case of *United States v. DeSalvo et al.*, Cr. No. 75-90 involves eighteen defendants and can be expected to require a trial of several weeks. The decision in *Marks* will have an obvious impact upon this extensive litigation. The other case presenting the potential for such an impact is *United States v. Peraino*, Cr. No. 75-91. That case also involves eighteen defendants charged with pre-*Miller* obscenity offenses. The trial, scheduled to begin within a few months, will require several weeks and, since it occurs within the geographical limits of the Sixth Circuit, it will be substantially affected by the *Marks* decision.

It is therefore respectfully submitted that the conflict in the Circuits which the Respondent admits is one of continuing and vital improtance to equal administration of criminal laws within the United States. A Writ of Certiorari should therefore issue to review the judgment and opinion of the Sixth Circuit and to ensure that the enumerable defendants affected or to be affected by the *Marks* decision

receive the same treatment they would receive if their cases arose in other areas of the country.

Respectfully submitted,

ROBERT EUGENE SMITH, Esq.
GILBERT H. DEITCH, Esq.
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 892-8890

Attorneys for Petitioners.

Of Counsel:

ANDREW B. DENNISON, Esquire
216 East 9th Street
Cincinnati, Ohio 45202
(513) 621-6151

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975
NO. 75-708

STANLEY MARKS, HARRY MOHNEY,
GUY WEIR, AMERICAN AMUSEMENT CO., INC.,
and AMERICAN NEWS CO., INC.
Petitioners.

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONERS

ROBERT EUGENE SMITH, Esquire
GILBERT H. DEITCH, Esquire
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309

Attorneys for Petitioners.

Of Counsel:
ANDREW DENNISON, Esquire
216 East Ninth Street
Cincinnati, Ohio 45202

The Paul M. Harrod Company, Baltimore, Maryland 21234

INDEX

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Miscellaneous

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975
NO. 75-708

STANLEY MARKS, HARRY MOHNEY, GUY WEIR, AMERICAN AMUSEMENT CO., INC., and AMERICAN NEWS CO., INC.
Petitioners.

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONERS

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 520 F.2d 913 (6th Cir. 1975) and is set forth in Appendix A to the Petition for Writ of Certiorari herein.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 30, 1975. An application for rehearing was timely filed and denied on September 15, 1975. On October 6, 1975, Mr. Justice Stewart granted an extension of time to and including November 14, 1975, within which to file a Petition for Writ of Certiorari. The Petition was filed on November 13, 1975 and it was granted on March 1, 1976. This Court's jurisdiction is invoked under Title 28, United States Code § 1254 (1).

QUESTIONS PRESENTED

1. Whether defendants in obscenity prosecutions which are founded upon conduct occurring prior to this Court's decisions in *Miller v. California* and its companion cases are entitled to jury instructions founded upon the *Roth-Memoirs* obscenity formulation prevailing at the time of their conduct?

2. Whether an appellate court, in performing its duty enunciated in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), of independently determining the issue of obscenity, must itself view the materials charged as obscene?

3. Whether a jury may be instructed to determine the issue of obscenity on the basis of community standards based upon a community comprised of the precise geographical boundaries of a federal judicial district when all of the jurors are both drawn from and constantly exposed to the influences of other communities?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The pertinent provisions of the First Amendment are:

> "Congress shall make no . . . abridging the freedom of speech, or of the press . . . "

2. The pertinent provisions of the Fifth Amendment are:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT

Petitioners were charged in the Eastern District of Kentucky with conspiracy and substantive counts related to the interstate transportation of obscene films for the purpose of sale and distribution in violation of Title 18, United States Code, § § 371 and 1465.

Each of the substantive charges related to a separate allegedly obscene film exhibited at the Cinema X Theatre in Newport, Kentucky, the indictment charging said films had been transported in interstate commerce for the purpose of exhibition there. The conspiracy consisted of an alleged agreement among Petitioners to cause those instances of interstate transportation.

All of the conduct which formed the basis for the substantive counts of the indictment occurred between January 15, 1973 and February 27, 1973. The conspiracy count was

predicated upon an alleged agreement beginning August 1, 1970, and continuing through February 27, 1973. Thus the latest date pertinent to any of the conduct charged against Petitioners was February 27, 1973, several months prior to the announcement by this Court, on June 21, 1973, of new constitutional guidelines in the area of obscenity regulation.

The case came to be heard by a jury in a trial commencing October 9, 1973. Because the conduct for which Petitioners were prosecuted occurred prior to this Court's formulation of new obscenity standards in *Miller v. California*, 413 U.S. 15 (1973) and its companion cases, the Petitioners requested the Court to instruct the jury on the *"Roth-Memoirs"* obscenity formulation set forth in *Memoirs v. Massachusetts*, 383 U.S. 413 (1969) and *Roth v. United States*, 354 U.S. 476 (1957). The Court refused the request and, over objection, instructed the jury on the *"Miller"* obscenity formulation.

The jury was further instructed that the obscenity of the films was to be judged by the application of local community standards. They were instructed, over objection, that the community from which those standards were to be drawn was that comprised solely of the Eastern District of Kentucky. Petitioners objected to this charge on the ground that the subject films were exhibited at a theater located in what is essentially a single urban area comprised of the adjacent cities of Newport, Kentucky and Cincinnati, Ohio. The community instructed upon excluded the Cincinnati area and included much of rural Eastern Kentucky.

After conviction, Petitioners herein appealed and the United States Court of Appeals for the Sixth Circuit affirmed the judgments of conviction in a split decision. A Petition for

Rehearing was timely filed and denied in a further split decision. On Appeal, the Court of Appeals was asked to make an independent determination of the alleged obscenity of the films upon which the convictions rested. In performing this duty of independent appellate review, the Court of Appeals found all of the films obscene but failed to view any of them.

ARGUMENT

I.

INSTRUCTING THE JURY ON OBSCENITY STANDARDS WHICH WERE NOT FORMULATED UNTIL AFTER THE CONDUCT WITH WHICH PETITIONERS WERE CHARGED DEPRIVED PETITIONERS OF A FAIR TRIAL AND DUE PROCESS CONTRARY TO THE FIRST, FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The conduct upon which Petitioners' convictions rest all occurred several months prior to the announcement by this Court, on June 21, 1973, of new constitutional guidelines in the area of obscenity regulations. *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973); *Kaplan v. California*, 413 U.S. 115 (1973); *United States v. Twelve Two-hundred Foot Reels*, 413 U.S. 123 (1973); *United States v. Orito*, 413 U.S. 139 (1973).

The conduct with which Petitioners were charged thus occurred when the prevailing obscenity formulation was that definition commonly referred to as the *"Roth-Memoirs"* standard. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Roth v. United States*, 354 U.S. 476 (1957). Though Petitioners

requested jury instructions predicated upon the *Roth-Memoirs* guidelines which prevailed at the time of their conduct, the District Court instructed the jury on the newer obscenity standards set forth in *Miller*.

The propriety of the course taken by the District Court below has been reviewed and rejected by the United States Courts of Appeals for the First, Fifth, Ninth, and District of Columbia Circuits. All of those Courts found such action, in the circumstances presented below, to constitute a denial of due process.

The Ninth Circuit Court of Appeals was the first to be presented with a fact situation identical to that existing below – a post-*Miller* obscenity trial predicated upon pre-*Miller* conduct. *United States v. Jacobs*, 513 F.2d 564 (9th Cir. 1975). In that case *Jacobs* was indicted for knowingly receiving an obscene film transported in interstate commerce in violation of 18 U.S.C. §1462. The indictment was handed up after the *Miller* decision, but the date of the alleged offense was May 10, 1973, prior to *Miller*. Just as in this case, the District Court in *Jacobs* instructed the jury on the basis of *Miller* obscenity standards. The Court of Appeals reversed, finding such instructions constituted a due process violation equivalent in effect to an *ex post facto* law. In this regard the court noted:

> "The jury which convicted appellant was instructed using the definition of 'obscenity' enunciated in *Miller*, rather than the *Roth-Memoirs* definition which preceded it. Appellant argues that the *Miller* definition expanded the area of unprotected speech which is now made subject to criminal sanction under §1462, and that retroactive application of

> such expanded standards to his conduct was effectively the application of *ex post facto* law, violating his due process right to notice of the conduct proscribed. As we agree that the *Roth-Memoirs* gloss on 'obscenity' did not give appellant adequate notice that his conduct would be judged by the expanded standard ultimately applied, we reverse his conviction." 513 F.2d, at 565.

The Ninth Circuit went on to note the reasoning behind their conclusion that the application of the new standards would constitute a denial of due process. Observing that the enunciation of the *Miller* decision expanded the field of potential criminal liability, the Court held that due process prohibits the retroactive judgment of one's conduct on the basis of that expanded standard. As the Court itself stated:

> "We think that it is beyond controversy that the third prong of the *Miller* test expanded the field of potential criminal liability; indeed, the test was explicitly adopted to ease the prosecutor's burden. *Miller*, at 22, 93 S.Ct. 2607. When appellant received the film, he would have thought the act proscribed if he thought a jury would ultimately decide that the film was 'utterly without redeeming social value.' He could not have known that it was a crime to receive a pruriently interesting film which a jury might later determine to be lacking in 'serious literary, artistic, political or scientific value.' As appellant lacked notice of the subsequent expansion of the statute, due process fairness bars the retroactive judgment of his conduct using the expanded definition, and the conviction cannot stand." 513 F.2d, at 566.

The same fact situation was later presented to the Fifth Circuit in *United States v. Wasserman*, 504 F.2d 1012 (5th

Cir. 1974). The defendants in *Wasserman* were indicted in 1972 for conduct which occurred from 1970 through 1972. Subsequent to their indictment, however, the *Miller* decision was announced and the jury was instructed on the obscenity definition set forth in *Miller*. In reversing the conviction, the Fifth Circuit acknowledged and expressly followed the Ninth Circuit decision in *Jacob*. 504, F.2d, at 1014-1015.

In *Wasserman* the Fifth Circuit expressly noted that the constitutional prohibition against *ex post facto* laws was not applicable since it related only to legislation and not to judicial interpretation. *James v. United States*, 366 U.S. 213, 247-248 (1961). It was nonetheless held that the policy considerations underlying the prohibition of *ex post facto* laws are also present with respect to judicial decisions which affect the interpretation of a criminal statute. In either case, policy considerations mandate against punishing an individual for acts which, at the time they were performed, were not within the reach of a criminal statute.

In this regard the Fifth Circuit noted:

> "Prior to *Miller*, a distributor of sexually oriented material could not recognize that material which simply lacked 'serious literary, artistic, political or scientific value' could be constitutionally regulated. As far as such a distributor could determine, he was protected as long as the material was not utterly without redeeming social value." 504 F.2d, at 1015-1016.

Precisely the same conclusion as to the mandates of due process was reached by the Court of Appeals for the District of Columbia Circuit in *United States v. Sherpix, Inc.*, 512 F.2d 1361 (D.C. Cir. 1975). That case, like the instant one,

involved *Miller* based jury instructions in a prosecution for pre-*Miller* conduct. In reversing the convictions, the Court of Appeals noted:

> "At the times appellants distributed and exhibited the film, they could expect to escape conviction unless a jury concluded that the film was 'utterly without redeeming social value.' Since appellants were not afforded the opportunity to conform their behavior to the law as subsequently construed, due process bars the retroactive application of *Miller* test (c), and the instant convictions must be reversed." 512 F.2d, at 1366.

The same due process considerations influenced the First Circuit in *United States v. Palladino*, 490 F.2d 499 (1st Cir. 1974). That case involved a slightly different fact situation with both the conduct and the trial occurring prior to *Miller*. The question there was what standard to apply upon appellate review when such review occurs subsequent to *Miller*. In holding that such defendants could not be subjected to any of the detriments or harsher standards brought about by *Miller*, the Court of Appeals noted:

> "The defendants are caught in a period of transition, their prosecutions having taken place before the *Miller* decisions. *They cannot fairly be subjected to penalties for violations of rules established after their actions.*" 490 F.2d, at 500 (emphasis added).

The above decisions of various Courts of Appeal follow along the lines of reasoning enunciated by this Court in *Bouie v. City of Columbia*, 378 U.S. 347 (1964). The Court there held that enlargement of a criminal statute through judicial

construction precipitates considerations much like those underlying the prohibition against *ex post facto* laws. Noting the fundamental principal of law that "the required criminal law must have existed when the conduct in issue occurred," the court went on to state that that principal must apply "to bar retroactive criminal prohibitions emanating from courts as well as from legislatures." 378 U.S., at 354. Noting the similarity with *ex post facto* laws, the Court stated:

> "In unforseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids." 378 U.S., at 353.

It cannot be disputed that the enu tion of new obscenity standards in *Miller* broadened the availability of criminal sanctions. Indeed, this Court put forth the easing of the prosecutor's burden as one justification for its decision, noting that the government under existing standards shouldered "a burden virtually impossible to discharge under our criminal standards of proof." 413 U.S., at 22. However legitimate and well founded, the removal of this "virtually impossible" prosecutorial burden was surely an unpredictable expansion of the law. No reasonable man could possibly be held to have forseen, prior to *Miller*, that he could be convicted for the distribution of material merely because it lacked serious literary, artistic, political or scientific value.

This Court, in *Hamling v. United States*, 418 U.S. 87 (1974), implicitly recognized the due process problems inherent in any retroactive application of the expansion in the law brought about by *Miller*. The conviction in *Hamling* was on appeal when the *Miller* decision was announced, and this

Court thus held the petitioner entitled to review on the principals laid down in *Miller*. The entitlement, however, was limited to the *benefits* of the new principals enunciated in *Miller*:

> "Thus any constitutional principal enunciated in *Miller* which would serve to benefit Petitioners must be applied in their case." 418 U.S., at 102.

It is true that the court in *Hamling* stated that its *Miller* decision merely added a "clarifying gloss" to the prior construction of the federal obscenity statutes. 418 U.S., at 116. That statement was made, however, only in rejecting Petitioner's argument therein that the statute was unconstitutionally vague prior to *Miller*. Thus the Court merely held that the federal obscenity statutes were constitutionally specific under both the *Roth-Memoirs* clarifying gloss and under the later *Miller* clarifying gloss. *Id.* There can be no doubt that, although definite under either gloss, the law underwent a marked change in *Miller*. This marked change was not forseeable and it is thus violative of the most fundamental precepts of due process to apply it to Petitioners herein.

Finally, it should be noted that the gratuitous statement of the Court of Appeals herein that the films are obscene under any standard is not relevant to the question here presented. The issue before the Court deals with the propriety of jury instructions. The Petitioners contend that, since their conduct occurred prior to the enunciation of *Miller*, that they were entitled to jury instructions based upon the *Roth-Memoirs* obscenity formulation. The petitioners in *Hamling* and in the *Miller* cases all had the benefit of a jury instructed on the *Roth-Memoirs* formulation. A jury so instructed might well have found the films not obscene and the issue would thus

never have been before the Court of Appeals or this Court. A jury sitting in a state civil proceeding in Cincinnati, Ohio during the same period as the trial herein found one of the films here involved not obscene under the *Roth-Memoirs* formulation. With all due deference to the opinion of the Court of Appeals as to these films, what Petitioners seek is the opinion of a properly instructed jury.

II.

AN APPELLATE COURT PERFORMING ITS DUTY OF INDEPENDENTLY DETERMINING THE ISSUE OF OBSCENITY MUST VIEW THE MATERIALS CHARGED AS OBSCENE.

On appeal, the Petitioners' questioned the obscenity of the materials on which they were convicted. In this regard, the Court of Appeals was requested to review the materials charged as obscene and to make an independent determination of that question. In affirming the convictions, however, the court failed to make any such independent review of the materials. It was thus noted in dissent that:

> "Although the challenged films were lodged with the court as exhibits, the majority of the panel decided that an examination of them was not necessary for decision. Accordingly, the films were not seen by any member of the panel." 520 F.2d, at 923 n.1.

The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level had its origins in this Court's decision in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962). That case involved action by a local postmaster in withholding

delivery of certain magazines after finding them obscene. The publishers who had mailed the magazines brought suit in the United States District Court seeking injunctive relief, but their complaint was dismissed without opinion. The Court of Appeals affirmed the dismissal, holding that the evidence supported the administrative findings that the magazines were obscene and thus non-mailable matter.

This Court reversed in a judgment announced by Mr. Justice Harlan. The Court thought the dispositive question to be whether or not the magazines were in fact obscene. 370 U.S., at 488. On this issue, the Court noted that the determination below had been made under improper assumptions as to the law of obscenity. The Court, however, decided against remanding the case so that the initial determination of the obscenity issue judged by proper standards could be made in the lower court:

> "Whether this question [of obscenity] be deemed one of fact or mixed fact and law, see Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn L Rev 5, 114-115 (1960), we see no need of remanding the case for initial consideration by the Post Office Department or the Court of Appeals of this missing factor in their determinations." 370 U.S., at 488.

The Court decided that the determination of that issue must ultimately rest with it:

> "That issue, involving factual matters entangled in a constitutional claim, see Grove Press, Inc. v. Christenberry (CA 2 NY) 276 F.2d 433, 436, is ultimately one for this Court. The relevant materials being before us, we determine the issue for ourselves." *Id.*

The doctrine of independent review was again invoked by this Court in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). *Jacobellis* involved a conviction of a Cleveland, Ohio motion picture theatre operator for possessing and exhibiting the film "The Lovers." On appeal, this Court reversed in a judgment announced by Mr. Justice Brennan. On the issue of independent review, Mr. Justice Brennan, relying in part upon *Manual Enterprises, Inc. v. Day, supra*, stated:

> "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See Roth v. United States, supra, 354 U.S., at 497-498, 1 L.Ed.2d at 1541, 1515 (separate opinion). Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' *Id.*, at 498, 1 L.Ed.2d at 1514; see Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488, 8 L.Ed.2d 639, 647, 82 S.Ct. 1432 (opinion of Harlan, J.)." 378 U.S., at 188.

It was noted that the duty of appellate review is not a pleasant one, but it was held to be one which must be exercised:

> "We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by "sufficient evidence." The suggestion is appealing, since it would lift from our shoulders a

> difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees." 378 U.S., at 187-188.

Mr. Justice Brennan, in an opinion joined by Mr. Justice Goldberg, went on to conclude that reversal was necessary since the film "The Lovers" was not obscene. This conclusion as to the film was concurred in by Mr. Justice Stewart.

The continuing validity of the *Jacobellis* doctrine and of the appellate duty it imposes was recently affirmed by this Court in *Jenkins v. Georgia*, 418 U.S. 153 (1974). That case involved a conviction under a state obscenity statute founded upon the exhibition of the film "Carnal Knowledge." This Court reversed the conviction based upon its own viewing of the film, and the finding that the film could not, as a matter of constitutional law, be held obscene. This same course of independent review has been followed here in several cases. *See, e.g., Kois v. Wisconsin*, 408 U.S. 229 (1972); *Hamling v. United States*, 418 U.S. 87 (1974).

The necessity of independent review derives from the fact that the classification of materials as obscene is a constitutional decision. This is so because materials which are not obscene are constitutionally protected and their distribution or exhibition may not, consistent with the First Amendment, form the basis for a criminal conviction. Further, in making this determination of constitutional law, the material must be judged "as a whole." *Miller v. California*, 413 U.S. 15, 24 (1973). No decision of such constitutional magnitude can be made any other way. It is necessary so that distributors of

protected First Amendment materials may operate free from the chilling effect which would occur in the absence of complete appellate review. Thus the distributors of the motion picture film "Carnal Knowledge" knew that they could not be punished for their activity until this Court had independently viewed the film and determined its constitutional status as protected or unprotected speech. In the sensitive area of First Amendment freedoms, a chilling effect will necessarily result unless the availability of this complete appellate review is reaffirmed.

III.

THE DENIAL OF PETITIONERS' REQUESTS TO CHARGE THE JURY ON THE LOCAL COMMUNITY STANDARDS OF CINCINNATI-COVINGTON AND INSTRUCTING THE JURY ON THE COMMUNITY STANDARDS OF THE ENTIRE EASTERN DISTRICT OF KENTUCKY DENIED PETITIONERS A FAIR TRIAL AND DUE PROCESS, CONTRARY TO THE FIRST, FIFTH, AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The jury below was instructed to determine the obscenity of the materials charged against the Petitioners' on the basis of local community standards. *Miller v. California*, 413 U.S. 15 (1973). That local community was defined by the court as encompassing the geographical boundaries of Eastern District of Kentucky. Petitioners' objected to that definition of the community and requested that the jury be charged on the basis of local community standards in the Cincinnati metropolitan area. That area comprises the city of Cincinnati and several suburbs, many of which, including Newport and Covington, are in Kentucky.

The charges against Petitioners were predicated upon interstate transportation of films for the purpose of exhibition at the Cinema-X Theater in Newport, Kentucky. As has been stated, Newport is a suburb of Cincinnati, Ohio and is directly connected to Cincinnati by a bridge spanning the Ohio River. The trial herein took place in Covington, Kentucky which is yet another suburb of Cincinnati, Ohio, directly connected to Cincinnati by another bridge spanning the Ohio River.

It cannot be disputed that major influences upon the residents of Newport and Covington, Kentucky derive from Cincinnati, Ohio. The only major newspapers serving those communities is the Cincinnati Post. Stations located in Cincinnati constitute the only source of television transmissions in the area. The major radio stations are also located in Cincinnati.

The jury panel below was drawn only from the metropolitan Covington area. Furthermore, at least half of the jurors, although living in Covington, worked in Cincinnati, Ohio. They were thus directly exposed to the influences of the Cincinnati area in connection with their employment. This exposure, moreover, is in addition to the media exposure of Cincinnati which extends to all Covington residents through the television and newspaper sources described above.

Despite the fact that all the jurors were thus drawn from a suburb of Cincinnati and that half of them worked in Cincinnati, the jury was instructed to assess the materials on the basis of the local community standards of the Eastern District of Kentucky. The Eastern District of Kentucky covers the entire eastern half of the state, running from Ohio on the north, to Tennessee on the south and to West Virginia and

Virginia on the east. The district is comprised of sixty-seven different counties and encompasses the major cities of Covington, Newport, Ashland, Frankfort, and Lexington, Kentucky. The district includes the urban areas in and around the aforementioned cities as well as the open country and hill areas of the Cumberland Mountains and Appalachia. It was the standards of this area upon which the jury was instructed to determine the obscenity of the materials charged against Petitioners.

To thus define the "community" by the precise political-geographic boundary of the Eastern District of Kentucky does violence to the principals of due process and fair trial. A community does not arbitrarily originate or terminate at a political boundary. The major metropolitan area of Cincinnati, Ohio is the "community" from which the jurors were drawn, to which the jurors were exposed, and in which the materials were exhibited. Despite this, the "community" upon which the instructions were predicated was a political one including the Cumberland Mountains and Appalachia, hundreds of miles away.

Any deliniation of the proper community on which to judge materials must begin with *Miller v. California*, 413 U.S. 15 (1973). This court there held that the obscenity of materials need not be judged by national standards which the court held were impossible and unworkable. The application of state-wide local standards was approved in *Miller*, but the court left unclear the limits on how the "local community" is to be defined in each instance.

The issue received some clarification in *Hamling v. United States*, 418 U.S. 87 (1974). *Hamling* rejected the contention

that the state-wide community approved in *Miller* constituted the only acceptable local community. 418 U.S., at 105. The Southern District of California was there approved as one permissible local community.

In approving the federal judicial district as an acceptable local community, however, the court indulged in a crucial presumption:

> "Since this case was tried in the Southern District of California, *and presumably jurors from throughout the district were available to serve on the panel which tried petitioners*, it would be the standards of that 'community' upon which the jurors would draw." 418 U.S., at 105-106 (emphasis added).

The presumption indulged in *Hamling* regarding the source of the jurors is not appropriate here. The jurors were *not* drawn from the entire Eastern District of Kentucky, but rather only from the metropolitan Covington area.

The teaching of *Hamling*, with respect to the definition of the local community, may be briefly stated as follows:

> "A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination." 418 U.S., at 104.

The court goes on to restate the above proposition as follows:

> "The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory

> construction, is to permit the jurors sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person applying contemporary community standards' would reach in a given case." 418 U.S., at 105.

Upon the application of the above standards to this case, it can be seen that the instructions below were clearly erroneous. The community or vicinage from which the jurors were drawn is the metropolitan Covington area. They were constantly exposed to media coverage deriving from Cincinnati and over half of them spent their working hours in Cincinnati. Despite this, they were instructed to excise Cincinnati from their consideration. Further, they were instructed to include rural areas including portions of Appalachia from which none of them were drawn and to which none of them were exposed.

In *Hamling* this court made clear that jurors must be instructed on the local community or vicinage from which they are drawn and to which they are exposed. In that regard, the instructions in this case were both over and under inclusive. They were over inclusive by instructing the jurors to apply standards from vast rural areas to which none of the jurors were exposed and from which none were drawn. They were under inclusive by reason of their excision of Cincinnati, Ohio which is a community or vicinage to which all of the jurors were constantly exposed and in which half of the jurors worked. On the basis of *Hamling* therefore the decision below must be reversed.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

ROBERT EUGENE SMITH, Esquire
GILBERT H. DEITCH, Esquire
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309

Attorneys for Petitioners.

Of Counsel:

ANDREW DENNISON, Esquire
216 East Ninth Street
Cincinnati, Ohio 45202

No. 75-708

In the Supreme Court of the United States

OCTOBER TERM, 1976

STANLEY MARKS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

FRANK H. EASTERBROOK,
Assistant to the Solicitor General,

JEROME M. FEIT,
JAMES A. HUNOLT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

Cases—Continued

Cases—Continued

Constitution and statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-708

STANLEY MARKS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A.1-A.19) is reported at 520 F.2d 913. The opinion of the district court (App. 45-58) is reported at 364 F. Supp. 1022.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1975. A petition for rehearing was denied on September 15, 1975. On October 6, 1975,

Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including November 14, 1975. The petition was filed on November 13, 1975, and was granted on March 1, 1976. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in an obscenity prosecution that took place after *Miller* v. *California*, 413 U.S. 15, for conduct that occurred before that decision, the district court properly charged the jury under the standards announced in that decision.

2. Whether a court of appeals must view the materials in order to determine whether they are protected by the First Amendment.

3. Whether the jury was properly instructed to assess the materials in terms of the community standards of the judicial district from which the jurors were selected and in which the trial was held.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, Clause 3 of the Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

The First Amendment to the Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

18 U.S.C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * * * *

18 U.S.C. 1465 provides in pertinent part:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lacivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.
>
> * * * * *

STATEMENT

1. In early 1973 the Cinema X Theatre in Newport, Kentucky, was managed by petitioner Marks

(Tr. 434, 559-560).[1] Petitioner Mohney owned the Cinema X Theatre; he also was the sole owner of petitioners American Amusement Company, Inc., and American News Company, Inc. The corporate petitioners had their offices in Durand, Michigan (G. Exhs. 48, 49). Petitioner Weir was the general manager and president of American Amusement (G. Exhs. 26, 27, 49).

Petitioner Weir scheduled movies for the Cinema X, and the booking of those movies was accomplished by American Amusement (Tr. 561-566). Weir also arranged for advertising of the theater (G. Exhs. 26, 27). Cinema X employees were paid by petitioner American News (Tr. 122, 437).

The films "Deep Throat" and "Swing High," as well as a number of previews,[2] were shown at the Cinema X in late January or in February 1973 (Tr. 500-501; G. Exh. 55). They were supplied by American Amusement and were sent to Cinema X from either Durand, Michigan, or Clarksville, Indiana (Tr. 446-448, 450, 459, 461-462, 488-489).[3]

2. On February 26, 1973, an Assistant United States Attorney applied to a federal magistrate for a warrant authorizing the search of the Cinema X

---

[1] "Tr." refers to the transcript of the trial. "G. Exh." refers to exhibits introduced by the government at trial.

[2] The previews at issue here are entitled "Teenage Cowgirls," "Black on White," "A Few Bucks More," "Memoirs of a Madam," and "Doctor's Disciples."

[3] American Amusement owned a theater in Clarksville, Indiana (Tr. 647-648).

and the seizure of certain films (App. 10). Special Agent Vernon R. Glossup of the Federal Bureau of Investigation submitted an affidavit (App. 14-26) describing in some detail the films sought to be seized. Special Agent Ronald F. Aebly also submitted an affidavit (App. 11-13) describing more briefly one film and a preview.

The United States Magistrate notified petitioner Marks that a hearing would be held the next day to determine whether the warrant would be issued (App. 4-9). After this adversarial hearing the Magistrate issued the search warrant; the warrant was executed on February 27 and a return made on February 28 (App. 29-31).

On April 27, 1973, an indictment was returned in the United States District Court for the Eastern District of Kentucky, charging petitioners with conspiracy to transport obscene materials in interstate commerce, in violation of 18 U.S.C. 371, and with transportation of obscene materials in interstate commerce, in violation of 18 U.S.C. 1465 (App. 33-44).

Petitioners made a number of pretrial motions. The only motion relevant here is a motion, on multiple grounds, to dismiss the indictment. The district court denied the motion on October 5, 1973 (App. 47-52). After rejecting a number of arguments similar to arguments ultimately rejected by this Court in *Hamling* v. *United States*, 418 U.S. 87, the district court rejected petitioners' argument "that since *Miller* [v. *California*, 413 U.S. 15] formulated a new test of obscenity, prosecution of [petitioners] for con-

duct prior to that opinion would invoke the constitutional proscription of ex post facto culpability" (App. 49). The court observed that the *Ex Post Facto* Clause applies only to Acts of Congress, and stated (*ibid.*):

> Although Bouie v. City of Columbia, 378 U.S. 347 (1964), did hold that a retroactive application of a court interpretation may offend the Due Process Clause, it is evident that the factors present in the obscenity area render that case easily distinguishable; the Bouie holding should be applied only to decisions which are " 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue . . .'." Id. at 354. As admitted by the [petitioners], the previous uncertainty in the realm of obscenity has only been settled by the recent Supreme Court decisions. The Miller group did not create a new definition of illegal conduct, but merely clarified earlier concepts of obscenity of which the [petitioners] were constructively aware. Rosen v. United States, 161 U.S. 29 (1896); Nash v. United States, [229 U.S. 373]; United States v. Wurzbach, [280 U.S. 396]. Further, the Court's action in remanding Miller and its accompanying cases to the lower courts for reevaluation in light of the clarified standards intimates that the use of the Miller standard in the case at bar is entirely proper; prospective application would have been decreed if constitutional violation had been feared.

The district court consequently declined to dismiss the indictment.

3. The trial commenced on October 9, 1973, and lasted until October 19, 1973. The films, which were shown to the jury, were described by the court of appeals as follows (Pet. App. A.3 n.1):[4]

> A composite of all of the films and film previews depict acts of cunnilingus, fellatio, onanism, sodomy, male ejaculation, sexual intercourse and group sex.
>
> *Deep Throat*: portrayed a young female in quest of sexual fulfillment, which had eluded her because her clitoris was lodged in her throat. Scenes depicted males and females engaged in cunnilingus, sodomy, group sexual encounters where sodomy and fellatio were simultaneously practiced, sexual intercourse, and male ejaculation.
>
> *Swing High*: depicted a group sexual encounter where cunnilingus, fellatio, sexual intercourse, masturbation, onanism, and sodomy were practiced.
>
> Previews
>
> *Doctor's Disciples*: depicted acts of onanism, sexual intercourse, and male ejaculation.
>
> *Teenage Cowgirls*: two very young females are shown in close up scenes of fellatio and sexual intercourse.
>
> *Black on White*: depicted various acts of fellatio, cunnilingus and sexual intercourse by

[4] The films were not viewed by the court of appeals (Pet. App. A.19 n. 1 (McCree, J., dissenting)). The description set out in the opinion of the court apparently was based on the description of the films that appears in affidavits supporting an application for a search warrant (App. 11-26).

a white male with a black female and a black male with a white female.

Memoirs of a Madam: portrayed three couples on a bed in various stages of nudity engaging in oral and genital acts, and with one female masturbating with a vibrator. This preview also depicted a black male and white female engaged in sexual intercourse.

A Few Bucks More: portrayed fellatio, and male enjaculation [*sic*].

Petitioners presented the testimony of a psychologist, a minister, a psychiatrist, a sociologist, and an English teacher. These witnesses were of the view that the films were not patently offensive, did not appeal to the prurient interest under contemporary community standards,[5] and had serious artistic, literary, and scientific value (Tr. 353-355, 407-410, 745-755, 812-814, 825-835).

The district court instructed the jury that the test for obscenity is "[w]hether to the average person, applying contemporary community standards, the film taken as a whole appeals to the prurient interest" (App. 84). The court told the jury that it should find that the materials meet this test if three elements exist (*ibid.*):

> (1) whether the average person, applying contemporary community standards would find that

[5] Petitioners' experts based their opinions on standards in the Covington, Kentucky, area, where the trial occurred, as well as on standards in Cincinnati, Ohio, Minnesota, Maryland, and the nation as a whole (Tr. 328-329, 334, 348, 393, 739-740, 808).

> the film, taken as a whole, appeals to the prurient interest in sex; (2) whether the film depicts or describes, in a patently offensive way, sexual conduct, including but not limited to ultimate sexual acts, normal or perverted, actual or simulated, masturbation, excretory functions, and the lewd exhibition of the genitals, and (3) whether the film, taken as a whole, lacks serious literary, artistic, political or scientific value.

The jury was instructed that the "contemporary community standards" to which it should refer are the standards generally held in the Eastern District of Kentucky.[6]

With regard to the third element of the test for obscenity, the jury was instructed (App. 89):

[6] The district court enlarged on that instruction in the following manner (App. 86-87):

> "Contemporary community standards" means the standards generally held throughout the Eastern District of Kentucky. We are not measuring this term "contemporary community standards" directly with what happened in Newport or on Monmouth Street, but it includes the whole Eastern District of Kentucky. You people on the jury are from different parts. Some of you are from Newport, Campbell County, maybe Monmouth Street, I don't know; others of you from out in Boone County, some in Bracken, some in Mason. This District extends to sixty-seven counties in Kentucky, goes throughout the whole eastern district of Kentucky, as I explained that to you when you qualified as jurors. So you are not to say, "Well, a thing like that wouldn't offend a person or even be obscene maybe under some conditions, but on the other hand, there are things we know to some people more prudish that even something of less significance then might be drawn from these films would be considered obscene. * * *

> Obscenity is excluded from constitutional protection because it is without serious social importance. Obscene utterances are no essential part of an exposition of ideas and are of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Of course, the mere fact that a film deals with sex does not mean that it cannot have value to society. Indeed, such a film can have social importance if it portrays sex in a manner that advocates ideas or that has literary, scientific, political or artistic value. It is for you to determine whether the film in issue in this case is of such value to society. If you find that it lacks serious literary, artistic, political, or scientific value, you can brand it obscene. If you find that it does have those, one or more of those adjectives that I have given you, then you should determine that it is not obscene.

The jury acquitted petitioners of the charge in Count 8 of the indictment, which involved the film preview "Let Me Count the Lays" (Tr. 939-943). The jury returned a verdict of guilty against petitioner American News on the conspiracy count. The other four petitioners were convicted on seven substantive counts and the conspiracy count (*ibid.*). Petitioners Marks, Mohney and Weir were sentenced to concurrent terms of 90 days' imprisonment and were fined $16,000. Each corporate petitioner was fined $5,000 on the conspiracy count. Petitioner American Amusement was fined $14,000 for its substantive convictions. See Tr. 944-950.

4. The court of appeals rejected (Pet. App. A.11-A.18) petitioners' argument that the charge to the jury should have been based upon the standards of *Roth* v. *United States*, 354 U.S. 476, as modified by the plurality opinion in *Memoirs* v. *Massachusetts*, 383 U.S. 413, rather than upon the standards of *Miller* v. *California*, 413 U.S. 15. The court observed that the *Roth-Memoirs* test had never commanded the support of more than three Justices at one time, and that it "imposed a burden virtually impossible to discharge under our criminal standards of proof" (Pet. App. A.12). The court also believed that the district court was required to give the charge it gave "by the specific terms of the remand in *Miller*" (*id.* at A.14). Finally, the court indicated that the difference between the *Roth-Memoirs* standards and the *Miller* standards was immaterial in this case because "[i]t is plain to us that the material in the present case was obscene, irrespective of which standards are applied" (*id.* at A.12; see also *id.* at A.15). The court reached its decision that the films were unprotected by the First Amendment under either standard without viewing the films themselves.

The court concluded that the district court correctly had instructed the jury to apply the community standards of the judicial district where the trial was held (Pet. App. A.10-A.11). It held that the relevant community standards are those of the judicial district where the jurors reside, and not the standards of a nearby metropolitan area where some of the jurors may be employed.

Judge McCree dissented (Pet. App. A.18-A.19). He would have followed the three courts of appeals that held that it is unfair to apply the *Miller* standards to conduct occurring prior to the date of that decision. He declined to decide whether the films are in fact protected by the First Amendment, because "to speculate on our view of the films how the jury might have decided the case if it had been given the proper instructions would deny the right of trial by jury" (*id.* at A.19; footnote omitted).

SUMMARY OF ARGUMENT

I

Petitioners have been caught in a period of transition. Their conduct took place prior to *Miller*, and their trial took place after that decision. We believe that they cannot fairly be subjected to penalties for violations of rules established after their actions.

Although the *Ex Post Facto* Clause does not directly apply to judicial decisions, the principles of that Clause are deeply engrained in our law. The Court held in *Bouie* v. *City of Columbia*, 378 U.S. 347, that rules established by judicial expansion of the scope of a statute can apply only prospectively, lest individuals be deprived of fair warning of the acts prohibited. The same principle applies to judicial decisions relaxing constitutional restrictions that previously had limited a statute's scope; in either event, a person cannot fairly be subjected to punishment for acts that, when committed, could not have been punished.

Miller changed the prevailing rules. It discarded the *Memoirs* standards of obscenity and expanded the categories of material whose distribution and exhibition legitimately could be made criminal. Accordingly, the new standards should not have been used as the basis for the charge to the jury in petitioners' case. As in *Hamling* v. *United States*, 418 U.S. 87, 100-102, petitioners should receive the benefit but not the detriment of the changes in the law worked by *Miller*.

II

The court of appeals held that the films involved in this case are not "speech" within the meaning of the First Amendment. It came to this conclusion without looking at the films themselves. We agree with petitioners that this was error.

There are substantial reasons why judges of the courts of appeals should look at the offending materials. Distinguishing the obscene from the non-obscene involves a mixed question of fact and constitutional law implicating constitutional values that have long been the subject of special solicitude by the Executive Branch as well as the Judiciary. Because books and films must be assessed "as a whole" to determine whether they are obscene, affidavits and oral testimony at trial usually will be insufficient to enable the court to place the sexually-oriented material in the context in which it occurs. In most cases, the material speaks for itself. "The films, obviously, are the best evidence of what they represent." *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56. Unless

the court examines the materials in question it may be unable adequately to discharge its obligation to provide an independent review.

The factors militating against examination of the films here are not of similar weight. We do not doubt that the task of looking at these films may be unpleasant and time-consuming for judges who are already overworked. But examination of the films will not make a legitimate conviction any less likely to be upheld on appeal, and it will provide, at least in some cases, an important safeguard for First Amendment rights. Accordingly, we conclude that the court of appeals should have looked at the allegedly obscene materials in this case. Its failure to do so requires a remand to allow it to carry out this task.

III

The jury was correctly instructed to consider the films in light of the contemporary community standards of the judicial district in which the trial was held. All of the jurors came from the district. The judicial district has been approved by this Court as the appropriate community on which the jury should draw. *Hamling, supra,* 418 U.S. at 105-106.

Petitioners' argument that the "metropolitan Cincinnati area" would have been more appropriate is beside the point. Appellate courts ought not to engage in the bootless task of selecting the "best" community from among the many arguably appropriate communities. The charge in this case served the purpose of the community standards instruction by en-

suring that the materials would be assessed on an objective basis rather than on the subjective sensibilities of the 12 people who happened to be selected as jurors. Like the instructions in *Hamling,* they were constitutionally adequate.

ARGUMENT

I

THE INSTRUCTIONS TO THE JURY WERE IMPROPER BECAUSE THEY WERE BASED ON A DEFINITION OF OBSCENITY THAT DID NOT PREVAIL AT THE TIME OF THE ACTS CHARGED IN THE INDICTMENT

A. Introduction

Petitioners' major contention is that the district court improperly charged the jury based upon the obscenity standards of *Miller* v. *California,* 413 U.S. 15, when the conduct alleged to constitute the crimes took place prior to *Miller.* They contend that the charge should have been based upon the standards of *Roth* v. *United States,* 354 U.S. 476, as modified by the plurality opinion in *Memoirs* v. *Massachusetts,* 383 U.S. 413 (the *Roth-Memoirs* standards). A similar problem was involved in *Hamling* v. *United States,* 418 U.S. 87, which required the Court to decide what standards govern appellate review of cases that had been tried under the *Roth-Memoirs* standards, but which had not become final on the day *Miller* and related cases were decided.

Our brief in *Hamling* (No. 73-507, October Term, 1973) stated at page 14 that the "correct answer" to that problem is given by *United States* v. *Palladino*, 490 F.2d 499, 500 (C.A. 1). It quoted from *Palladino* as follows:

> We must now decide to what extent the standards articulated in the recent Supreme Court decisions dealing with state obscenity statutes apply to this federal case retroactively. The defendants are caught in a period of transition, their prosecutions having taken place before the *Miller* decisions. They cannot fairly be subjected to penalties for violation of rules established after their actions. On the other hand, the remand of the entire group of pending obscenity prosecutions suggests that to the extent that *Miller* creates protections not afforded by prior standards, these cannot be denied to persons whose prosecutions have not terminated. * * * [Footnote omitted.]

The Court accepted our argument in *Hamling*. It reviewed the materials in question and found "that the jury could constitutionally find [them] obscene under the *Memoirs* test" (418 U.S. at 100). It gave petitioners the benefit, but not the detriment, of the changes in the law occasioned by *Miller*. 418 U.S. at 102.

We believe that the same principle governs this case. Petitioners "are caught in a period of transition." "They cannot fairly be subjected to penalties for violation of rules established after their actions." [7]

[7] We concluded in *Hamling* (Br. 24) that the *Miller* standards "have no applicability to * * * pre-*Miller* conduct."

Accordingly, the district court should have given the jury a charge based upon the *Roth-Memoirs* standards, and on review the court of appeals should have given petitioners the benefit, but not the detriment, of the *Miller* standards. This principle is supported by the clear consensus of the courts that have considered this question.[8] Accordingly, the judgment of the court of appeals should be reversed and the case remanded for a new trial. We explain below at greater length why we have reached this conclusion.

[8] See *United States* v. *Linetsky*, 533 F.2d 192, 201-203 (C.A. 5); *United States* v. *Jacobs*, 513 F.2d 564 (C.A. 9); *United States* v. *Sherpix, Inc.*, 512 F.2d 1361 (C.A.D.C.); *United States* v. *Wasserman*, 504 F.2d 1012 (C.A. 5). *Contra*, *United States* v. *Friedman*, 528 F.2d 784 (C.A. 10), petition for a writ of certiorari pending, No. 75-1663.

Jacobs, *Sherpix* and *Wasserman* are supported by *Palladino*, *supra*, and *United States* v. *Thevis*, 484 F.2d 1149 (C.A. 5), certiorari denied, 418 U.S. 932, in which the defendants were convicted prior to *Miller*. In each case the court stated that *Roth-Memoirs* was the required standard (*Palladino*, *supra*, 490 F.2d at 500; *Thevis*, *supra*, 484 F.2d at 1155). The court in *Thevis* judged the materials independently under both tests. In *Palladino* the court remanded for a new trial under the *Roth-Memoirs* standards.

Most of the state courts that have considered the issue have concluded that pre-*Miller* conduct must be tried under the *Roth-Memoirs* standards. *State* v. *Timmons*, 12 Wash. App. 48, 527 P.2d 1399; *State* v. *DeSantis*, 65 N.J. 462, 323 A.2d 489; *State* v. *Harding*, 114 N.H. 335, 320 A.2d 646; *State* v. *Welke*, 298 Minn. 402, 216 N.W.2d 641; *Rhodes* v. *State*, 283 So.2d 351 (Sup. Ct. Fla.). Contra, *McKinney* v. *City of Birmingham*, 52 Ala. App. 605, 296 So.2d 197 (Ct. Crim. App.), certiorari denied, 292 Ala. 2d, 726, 296 So.2d 202; *State ex rel. Chobot* v. *Circuit Court for Milwaukee County*, 61 Wis. 2d 354, 212 N.W.2d 690. See also *State* v. *Combs*, 536 P.2d 1301 (Ct. Crim. App. Okl.).

B. The Due Process Obligation To Give Fair Notice Requires That A Change In The Standards Of Proof Easing The Government's Burden In A Criminal Case Be Applied Prospectively Only

The application of new standards of criminal conduct to acts that took place before the new standards were announced would further no appropriate societal objectives. The new standards could not deter the newly-forbidden acts, for those acts already would have taken place. Moreover, to the extent that the new standards made criminal conduct that theretofore had not been criminal, retroactive application would be unfair, because it would punish persons for acts that were not illegal when committed.

The framers of the Constitution thought the principle that laws shall not retroactively penalize acts that were not forbidden when they occurred so important that they expressly provided that Congress shall pass no *ex post facto* law.

The first decision of this Court interpreting the *Ex Post Facto* Clause has been definitive. The understanding of the meaning of that Clause has not changed significantly since Mr. Justice Chase announced for a unanimous Court[9] in *Calder* v. *Bull*, 3 Dall. 385, 390, that a law is an *ex post facto* law if it makes criminal acts which were not forbidden when they occurred, if it increases the punishment for criminal acts, or if it "alters the legal rules of evidence, and receives less, or different testimony,

[9] The opinions in *Calder* were announced *seriatim*, but no other Justice took issue with Mr. Justice Chase.

than the law required at the time of the commission of the offence, in order to convict the offender."

The *Ex Post Facto* Clause is a limitation upon the powers of Congress. It consequently does not apply directly to judicial decisions. *Frank* v. *Mangum*, 237 U.S. 309. But the principles embodied by the *Ex Post Facto* Clause are deeply engrained in our jurisprudence. The Clause applies directly only to Congress, but "a comparable judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Pierce* v. *United States*, 314 U.S. 306, 311. A statute cannot have given fair warning of what it prohibits if, as construed by the courts, its scope is extended to the conduct in question only after the conduct had taken place.

A law is an *ex post facto* law if "in [its] relation to the offence, or its consequences [it] alters the situation of a party to his disadvantage" or "takes away or impairs the defence which the law has provided the defendant" at the time of the offense. *Kring* v. *Missouri*, 107 U.S. 221, 228-229 (quoting from *United States* v. *Hall*, 26 Fed. Cas. 84, 86-87 (No. 15,285)). In *Bouie* v. *City of Columbia*, 378 U.S. 347, the Court was confronted with a judicial interpretation of a state statute by a state court that altered the situation of a party to his disadvantage. It wrote (378 U.S. at 352-354):

> There can be no doubt that a deprivation of the right of fair warning can result not only from

> vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. * * * Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. * * * If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

The Court consequently reversed the conviction, which was based, as the Court understood it, upon an unexpected judicial expansion of clear statutory language.

Rabe v. *Washington*, 405 U.S. 313, applied the *Bouie* principle to an obscenity case. Rabe was charged under a state statute with showing an obscene film. The state courts were unable to find the film obscene under the *Roth-Memoirs* standards, but they upheld Rabe's conviction because, in "the context of its exhibition," it was obscene (405 U.S. at 315). The Court reversed, holding that the meaning of the statute could not be judicially expanded in this fashion after the conduct had occurred.[10]

If *Miller* had expanded the scope of clear and precise statutory language, then the Due Process

[10] See also *Douglas* v. *Buder*, 412 U.S. 430 (applying the *Bouie* principle to a state court's redefinition of the word "arrest" to include a traffic citation); *United States* v. *Potts*, 528 F.2d 883, 886 (C.A. 9) (*en banc*).

Clause, as interpreted in *Bouie* and *Rabe*, would prohibit applying the new standards to pre-*Miller* conduct. That, however, is not what happened. 18 U.S.C. 1465, the substantive statute upon which the prosecutions in this case were based, is sweeping. It prohibits all transportation in interstate commerce for the purpose of sale or distribution of "any obscene, lewd, lascivious, or filthy * * * film * * * or other article capable of producing sound or any other matter of indecent or immoral character * * *." *Miller* announced a constitutional standard that limited the reach of any statute to a constitutionally-defined group of "obscene" materials. See generally *United States* v. *12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 130, n. 7. The conduct described in Section 1465 can be punished only if it satisfies the constitutional test of "obscenity": the film as a whole appeals to the prurient interest of the average person, applying contemporary community standards; it depicts sexual conduct in a patently offensive way; and if, taken as a whole, it "lacks serious literary, artistic, political, or scientific value." *Miller*, *supra*, 413 U.S. at 24.

Bouie and *Rabe* involved cases of judicial expansion of statutory language. *Miller* did not expand the scope of a statute, but rather restricted it. Many cases before *Miller*, however, also had considered the constitutional standards applying to obscenity litigation. These cases, too, had announced rules restricting the application of the statutes. We be-

lieve that, if *Miller* relaxed the constitutional rules that previously had prevailed, its effect would be indistinguishable from judicial expansion of statutory language.

In either event, the new rule comes as a surprise to a person who believed that the old rule (whether statutory or constitutional) would be applied to his conduct. A person planning his affairs prior to the judicial decision expanding the scope of the statute's ambit of prohibition is caught unawares. He finds himself subjected to punishment for an act that, at the time it occurred, could not have been punished under prevailing legal rules. That change, if applied retroactively, would deprive a defendant of his constitutional right to fair notice of the rules that govern his conduct.

Perhaps there is room for legitimate differences of opinion about whether, in the run of cases, the *Bouie* principle should apply to judicial relaxation of judicially-created constitutional limitations upon the scope of a statute. When the case involves the First Amendment protection of free speech, however, the requirement of a fair warning is especially compelling. *Hynes* v. *Mayor and Council*, No. 74-1329, decided May 19, 1976, slip op. 10-13; *Buckley* v. *Valeo*, No. 75-436, decided January 30, 1976, slip op. 35-38; *Smith* v. *Goguen*, 415 U.S. 566, 573. We submit that to the extent *Miller* changed the prevailing standards for determining what is obscene and what is not, and to the extent that it made obscenity (however defined) easier for the prosecution to prove,

the new standards cannot fairly be applied to conduct that took place before those standards were announced.

We next discuss whether, and to what extent, *Miller* changed the prevailing standards of obscenity.

C. *Miller* Significantly Altered The Prevailing Standards Of Obscenity By Permitting Material To Be Found Obscene That Would Not Have Been Obscene Under The Prior Test

The court of appeals held that the *Bouie* principle does not forbid the giving of jury instructions based upon *Miller* in a trial involving pre-*Miller* conduct. This is so, it wrote, because the *Roth-Memoirs* standards never commanded the adherence of a majority of the Justices at one time, and so did not state the law. Since those standards never were the law, *Miller* did not "change" the law.[11] This Court, too, has observed on several occasions that the position of the plurality in *Memoirs* never became the position of a majority of the Court. *Miller*, *supra*, 413 U.S. at 15, 21-22, 24-25; *Hamling*, *supra*, 418 U.S. at 116-117.

The position of the plurality in *Memoirs* was a sharp break with earlier decisions of the Court in obscenity cases. The Court had concluded in *Roth*, its first constitutional obscenity decision, that the portrayal of sex does not by itself make material obscene. It held that material is obscene only if it

---

[11] *United States* v. *Friedman*, 528 F.2d 784 (C.A. 10), petition for a writ of certiorari pending, No. 75-1663, takes the same position.

"deals with sex in a manner appealing to prurient interest" (354 U.S. at 487), and that if it meets this standard it is "utterly without redeeming social importance" (354 U.S. at 484). The Court announced the following test for applying these principles: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." This formulation, it found, withstood "the charge of constitutional infirmity" (354 U.S. at 489).

From *Roth* until *Miller* no majority of this Court was able to agree on any different formulation of the test of obscenity.

Manual Enterprises, Inc. v. *Day*, 370 U.S. 478, was decided five years after *Roth*. Mr. Justice Harlan, in an opinion joined only by Mr. Justice Stewart, concluded that materials could not be deemed legally obscene unless they were patently offensive in addition to appealing to the prurient interest (370 U.S. at 482, 486). They thought that the patent offensiveness element was implicit in *Roth* and necessary to assure access to "worthwhile works in literature, science, or art" (370 U.S. at 487). Mr. Justice Black concurred in the result; two Justices took no part in the decision; three Justices thought that the postal regulation in issue was unauthorized by statute; Mr. Justice Clark dissented.

Two years later, in *Jacobellis* v. *Ohio*, 378 U.S. 184, Mr. Justice Brennan, joined only by Mr. Justice Goldberg, stated that in obscenity cases the Court is required to make an independent constitutional

judgment whether materials are constitutionally protected (378 U.S. at 187-190). They suggested that in making that judgment prurient appeal could not be balanced against social importance, because, in their view, "a work cannot be proscribed unless it is 'utterly' without social importance" (378 U.S. at 191). Mr. Justice Black and Mr. Justice Douglas concluded that any prosecution for obscenity violates the First Amendment; Mr. Justice Stewart concluded that the motion picture involved in the case was not "hard-core pornography" (378 U.S. at 197) and hence not obscene; Mr. Justice White concurred without opinion; three Justices dissented.

Mr. Justice Brennan's opinion in *Jacobellis* foreshadowed the plurality view announced two years later in *Memoirs*. The opinion by Mr. Justice Brennan, joined by the Chief Justice and Mr. Justice Fortas, stated that obscenity, as defined in *Roth*, exists only if three elements coalesce (383 U.S. at 418):

> (a) The dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

Mr. Justice Black and Mr. Justice Douglas concurred in the reversal of the judgment holding the book obscene, writing once more that obscenity is absolutely protected by the First Amendment. Mr.

Justice Stewart, also concurring in the judgment, adhered to the view that "hard-core pornography" can be forbidden; applying this standard, he found the materials in *Memoirs* not to be obscene.

In separate dissenting opinions, Mr. Justice Clark and Mr. Justice White asserted that the test adopted by the plurality was contrary to the intent of *Roth*. Agreeing that the social importance of materials is relevant to the issue of obscenity under *Roth*, they concluded that lack of social value is not an independent constitutional test. Mr. Justice Harlan, also dissenting, held to the view that federal prosecution of allegedly obscene matter is limited to "hard-core pornography," "material that is patently offensive or whose indecency is self-demonstrating" (383 U.S. at 457).

Following this, in the brief *per curiam* opinion in *Redrup* v. *New York*, 386 U.S. 767, the Court began the practice of reviewing allegedly obscene materials in light of the differing views of the various Justices. Thirty-one cases were subsequently reversed on the authority of *Redrup*. They are collected in Mr. Justice Brennan's dissenting opinion in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 82-83 n. 8. That practice ended when the Court was able to assemble a majority in *Miller* for a single standard of obscenity.

As this brief survey of the twists and turns of obscenity law between *Roth* and *Miller* shows, the prevailing standards were far from clear. An argument in support of the judgment of the court of ap-

peals would start from this point. It would proceed much as follows: The standards adopted by the plurality in *Memoirs* did not derive from *Roth* but were, as the dissenting Justices pointed out in *Memoirs*, and as the Court held in *Miller*, a significant departure from the *Roth* standards. See *Miller*, *supra*, 413 U.S. at 21. The test propounded by the *Memoirs* plurality never commended the adherence of more than three Justices. Because only a minority of the Court subscribed to the new standards, the *Roth* standards remained as the definitive expression of constitutional law.[12] Those who were engaged in purveying sexually-oriented materials between *Roth* and *Miller* were accordingly obliged to look to the *Roth* standards alone. Once *Miller* held that the *Memoirs* standards were not required by the Constitution (see 413 U.S. at 21-25), *Miller* became the controlling decision. The standards of *Miller* are not significantly different from the standards of *Roth*.[13] Thus, the argument would conclude, all trials now should take place under the *Miller* standards, no matter when the conduct in question occurred.

---

[12] Cf. *United States* v. *Pink*, 315 U.S. 203, 216, holding that an affirmance by an equally divided Court is of no precedential effect because "the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases." See also *Alaska* v. *Troy*, 258 U.S. 101, 111; *Hertz* v. *Woodman*, 218 U.S. 205, 212-214.

[13] Indeed, because of the requirement stated in *Miller* that each statute explicitly describe the depictions made criminal, it could be argued that the rule of *Miller* is more favorable to defendants than were the *Roth* standards.

In our view, however, this argument is unavailing. Between 1966 and 1973 the test in *Memoirs* was the prevailing rule. Once the Court began the practice in *Redrup* of reversing obscenity convictions based on the views of each individual Justice, the *Memoirs* standards became of central importance. Because Justices Black and Douglas believed that obscenity was constitutionally protected, no conviction could obtain the five votes necessary for its upholding unless it satisfied the tests laid down by the *Memoirs* plurality.

We submit that our brief in *Hamling* (pp. 33-34) put the matter in proper perspective.

> The Court stated in *Miller*, *supra*, 413 U.S. at 22, n. 3, that "[i]n the absence of a majority view," the Court began the practice in *Redrup*. This statement can not be interpreted to mean that the *Roth-Memoirs* standards were "unworkable;" they had not been overruled, and therefore, they were still the law and continued to guide lower courts, and people in general, in judging obscenity. Indeed, an analysis of *Redrup* indicates that at least three Justices subscribed to the *Roth-Memoirs*' standards,[19] two did not believe that obscenity could be constitutionally regulated,[20] and two others followed the original *Roth* formulation absent the "utterly without redeeming social value" test of *Memoirs*.[21] Accordingly, persons whose conduct did not transgress the *Roth-Memoirs* standards could not be constitutionally convicted of violating obscenity

> laws, since at least five Justices would find their actions constitutionally protected.

---

[19] Chief Justice Warren, Justices Brennan and Fortas adhered to the *Roth-Memoirs* formulation. See *Memoirs* v. *Massachusetts*, 383 U.S. 413, 414.

[20] Justices Black and Douglas believed obscenity was absolutely protected by the First Amendment. See *Ginzburg* v. *United States*, 383 U.S. 463, 476, 482 (dissenting opinions).

[21] Justices Clark and White followed the *Roth* formulation but did not accept the "utterly without redeeming social value" test. See *Memoirs* v. *Massachusetts*, 383 U.S. 413, 441, 460 (dissenting opinions).

The Court has recognized that when no position commands a majority of the Justices, the rule of the case is expressed by the most narrow view of a Justice or group of Justices concurring in the disposition. See *Gregg* v. *Georgia*, No. 74-6257, decided July 2, 1976, slip op. 12 n. 15, 38-39 n. 47 (opinion of Stewart, Powell and Stevens, JJ.); *Roberts* v. *Louisiana*, No. 75-5844, decided July 2, 1976, slip op. 9-11 (White, J., dissenting). The views of the plurality in *Memoirs* consequently became the prevailing rule.[14]

---

[14] See also *Green* v. *Oklahoma*, No. 75-6451, decided July 6, 1976, holding a state statute unconstitutional on the basis of two decisions—*Woodson* v. *North Carolina*, No. 75-5491, decided July 2, 1976, and *Roberts*, *supra*—in which no opinion was signed by a majority of the Justices. The disposition in *Woodson* and *Roberts* was similar in many ways to the disposition in *Memoirs*. In each case three Justices made up a plurality and were joined in the disposition by two Justices who concurred in the result. If *Woodson* and *Roberts* established a rule that could be followed in *Green*, then *Memoirs* must have established a rule.

Every court of appeals that considered the matter between *Memoirs* and *Miller* held, on similar reasoning, that the charge to the jury must be based on the *Roth-Memoirs* standards.[15] The fact is that until *Miller* was announced, any person planning his affairs would have concluded that he could not be convicted in an obscenity prosecution unless the prosecution could meet the *Roth-Memoirs* standards. *Miller* added a "clarifying gloss" to *Roth* (see *Hamling*, *supra*, 418 U.S. at 116), but in the process it discarded entirely the *Memoirs* standards.

The Court has recognized that *Miller* changed the constitutional test of obscenity. In *Miller* itself the trial had taken place after *Memoirs*, and the jury had been charged under the *Roth-Memoirs* standards. The Court indicated that this was proper, because the *Memoirs* test was "correctly regarded at the time of trial as limiting state prosecution under controlling case law" (413 U.S. at 30-31). The *Miller* Court explicitly formulated new rules to alleviate the almost impossible burden of proof that had been imposed on the prosecution by this "controlling case law."

[15] *Books, Inc.* v. *United States*, 358 F.2d 935 (C.A. 1), reversed, 388 U.S. 449; *United States* v. *Manarite*, 448 F.2d 583 (C.A. 2), certiorari denied, 404 U.S. 947; *United States* v. *Dellapia*, 433 F.2d 1252 (C.A. 2); *United States* v. *35 mm. Motion Picture Film*, 432 F.2d 705 (C.A. 2), certiorari dismissed *sub nom. United States* v. *Unicorn Enterprises, Inc.*, 403 U.S. 925; *United States* v. *Pellegrino*, 467 F.2d 41 (C.A. 9); *United States* v. *Young*, 465 F.2d 1096 (C.A. 9); *Southeastern Promotions Ltd.* v. *Oklahoma City*, 459 F.2d 282 (C.A. 10); *Huffman* v. *United States*, 470 F.2d 386 (C.A. D.C.), reversed, 502 F.2d 419 (C.A.D.C.). Cf. *Phelper* v. *Decker*, 401 F.2d 232, 240 (C.A. 5).

Although the *Miller* Court repeatedly emphasized that the *Memoirs* test had been endorsed by only three Justices, it also recognized that these three Justices combined with two Justices who believed that all obscenity was constitutionally protected to change the basic legal rules. It wrote (413 U.S. at 21; emphasis added) that in *Memoirs* "the *Court* veered sharply away from the *Roth* concept and, with only three Justices in the plurality opinion, articulated a *new test* of obscenity."

The same understanding is reflected in *Hamling*, which involved pre-*Miller* conduct that had been tried prior to *Miller* under the *Roth-Memoirs* standards. The Court reviewed the materials and found "that the jury could constitutionally find the brochure obscene under the *Memoirs* test" (418 U.S. at 100). Having reviewed the material under *Memoirs*, the Court also held that "any constitutional principle enunciated in *Miller* which would serve to *benefit* petitioners must be applied in their case" (*id.* at 102; emphasis added).

The Court explained (*id.* at 116) that it had rejected *Memoirs* "because it represented a departure from the definition of obscenity in *Roth*." It stated (*id.* at 116-117): "[s]ince *Miller* permits the imposition of a lesser burden on the prosecution * * * than did *Memoirs*, and since the jury convicted these petitioners on the basis of an instruction concededly based on the *Memoirs* test, petitioners derive no

benefit from the *revision* of that test in *Miller*" (emphasis added).

Miller characterized the *Roth-Memoirs* standards as "controlling case law." *Hamling* characterized *Miller* as a "revision" of the *Roth-Memoirs* standards. Accordingly, the charge to the jury in this case should have been based on the *Roth-Memoirs* standards, which prevailed at the time of the acts charged in the indictment.[16] Any other rule would deprive petitioners of fair notice of the standards under which their conduct would be evaluated, a warning that is particularly important in First Amendment cases.

D. The Error In The Charge To The Jury Was Not Harmless

The court of appeals wrote (Pet. App. A.12) that "[i]t is plain to us that the material in the present case was obscene, irrespective of which standards are

[16] It could be argued that the *Memoirs* standards met an earlier demise. *Kois* v. *Wisconsin*, 408 U.S. 229, reversed an obscenity conviction without mentioning *Memoirs* or *Redrup*. The Court relied on *Roth* and emphasized that the materials bore "some of the earmarks of an attempt at serious art" (408 U.S. at 231). Because petitioners' conduct took place after *Kois*, it could be argued that they were no longer entitled to rely on the *Memoirs* formulation.

We do not believe that the argument would be tenable. *Kois* reversed a conviction; because the materials were protected under the *Roth* standards, the Court had no occasion to refer to the more rigorous formulation of the *Memoirs* plurality. The Court did not explicitly discuss or reject the *Memoirs* formulation. It is unlikely that the Court thereby intended implicitly to effect such a significant change in constitutional doctrine.

applied." See also Pet. App. A.15, A.18. This suggests that the court of appeals believed that any error in the charge to the jury was harmless. We expressed a similar position in our Brief in Opposition.[17] Further reflection has convinced us, however, that the error was not harmless.

Because the court of appeals never viewed the films, its opinion that they are obscene under both the *Roth-Memoirs* and the *Miller* standards is not properly supported. See pages 34-41, *infra*. This defect could be rectified without a new trial. But even if the court of appeals were convinced upon seeing the films that they are obscene under either set of standards, that conclusion would not be a satisfactory substitute for the opinion of a properly instructed jury.

This Court has described the *Roth-Memoirs* standards as creating a burden of proof "virtually impossible" for the government to satisfy (*Miller*, *supra*, 413 U.S. at 22). Although we believe, as did the court of appeals, that the proof in this case satisfied that burden, we do not believe that it would be fair to characterize as "harmless" the giving of instructions that relieved the prosecution of that burden and allowed the jury to convict on a lesser amount

[17] We stated (Br. in Opp. 4; footnote omitted): "The films fall so squarely within the guidelines applicable both prior to and after *Miller* that petitioners could not have been prejudiced by the instructions given, even if those instructions were erroneous."

of proof.[18] We cannot say that the error was harmless "beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24.[19]

II

THE COURT OF APPEALS SHOULD HAVE VIEWED THE FILMS TO DETERMINE WHETHER THEY ARE PROTECTED BY THE FIRST AMENDMENT

Petitioners contended on appeal that the films are protected by the First Amendment and are not obscene. The court of appeals disagreed. It undertook to make an independent constitutional judgment, as this Court had done in *Jenkins* v. *Georgia*, 418 U.S. 153, to ensure that petitioners had not been convicted for speech protected by the First Amendment. It believed, however, that it could make this independent review without looking at the films themselves. We agree with petitioners that the court of appeals

[18] Cf. *Henderson* v. *Morgan*, No. 74-1529, decided June 17, 1976, slip op. 3-4 (White, J., concurring): "It cannot be 'harmless error' wholly to deny a defendant a jury trial on one or all elements of the offense with which he is charged." See also *Mullaney* v. *Wilbur*, 421 U.S. 684.

[19] Our conclusion that the error was not harmless is fortified by the fact that six months after petitioners' trial an Ohio criminal prosecution of the movie "Deep Throat," tried under the *Roth-Memoirs* standards in the Cincinnati area, ended in an acquittal by the jury. *State* v. *Cine-Ohio, Inc.*, Ct. Common Pleas, Hamilton County, Ohio, No. B-73 2801, verdict returned April 24, 1974.

could not adequately discharge its reviewing function without looking at the films.[20]

The United States has no interest in arguing that courts of appeals ought not to look at allegedly obscene materials in order to determine whether they are protected by the First Amendment. The task of looking at these materials may be unpleasant and time-consuming for judges; these are strong reasons for holding to a minimum the time and effort that must be invested by already overworked judges in looking at allegedly obscene matter. These interests are most closely associated with judicial administration, a matter in which the Executive Branch possesses little expertise. But this we know: the fact that judges of the court of appeals view the materials at issue in a particular case will not make a legitimate conviction less likely to occur, nor will it undermine the administration of justice in any particular.

At the same time, there are substantial reasons why judges of the courts of appeals should look at the offending materials. Distinguishing the obscene from the non-obscene involves a mixed question of fact and constitutional law. The question in every case is whether the materials are, in fact, "speech" pro-

[20] Our Brief in Opposition argued (p. 5) that "a personal viewing of the films is not a constitutionally-necessary prerequisite" to an independent appellate determination that they are obscene. Further consideration has led us to conclude that that position reflected insufficient attention to the First Amendment values involved. For the reasons discussed in the following text, we no longer adhere to it.

tected by the First Amendment. That is a sensitive question implicating constitutional values that have long been the subject of special solicitude by the Executive Branch as well as by the Judiciary.

The question presented in this case is not whether the courts of appeals have an obligation in appropriate cases to make an independent determination whether the materials are obscene—they clearly do —but whether they have the additional obligation to view the materials in order to make that determination. We believe that this question cannot be answered categorically; the answer must depend upon whether other information is sufficient to enable the appellate court to make an informed judgment about the materials as a whole.

Ever since *Roth* it has been unquestioned that books and films must be assessed "as a whole." Material is not obscene simply because it contains discussions or portrayals of sex. The material "as a whole" must appeal to the prurient interest, be patently offensive, and lack redeeming literary, artistic, political or scientific value. See *Miller*, *supra*, 413 U.S. 24; *Kois* v. *Wisconsin*, *supra*, 408 U.S. at 230; *Memoirs*, *supra*, 383 U.S. at 418; *Roth*, *supra*, 354 U.S. at 489.

In some cases it will not be necessary to look at the material itself in order to determine whether, viewed "as a whole," the material is obscene. For example, if the defendant were to agree that a particular affidavit or other statement fairly summarized the materials, there would be no need to look beyond

the summary. Unless the defendant wanted the court to examine the materials, there would be no need for it to do so. But that is not what happened in this case; petitioners asked the court of appeals to examine the films, but it considered only the testimony at trial and the descriptions of the films contained in the affidavits submitted in support of the application for the search warrants.

A review of the testimony at trial and of affidavits submitted in support of an application for a warrant is usually not sufficient to enable an appellate court to review the materials "as a whole." Affiants need only demonstrate that there is probable cause to support a warrant. They are at liberty to take parts of a film out of context and to omit descriptions of portions of a work that might indicate literary or artistic value. Their descriptions are not subject to cross-examination. And, although descriptions of the work contained in trial testimony may be more complete, they may amount to no more than a gloss on the material where, as here, it is exhibited to the jury.

Even events described fully on the printed page may appear in a different light in the film itself; the spoken or written word often cannot adequately convey the subtleties of a film or assess its artistic worth. Indeed, for these very reasons the Court has held that "expert" testimony is unnecessary in an obscenity case (*Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56) and that allegedly comparable materials need not be admitted into evidence (*Hamling*, *supra*,

418 U.S. at 125-127). "The films, obviously, are the best evidence of what they represent." *Paris Adult Theatre I, supra,* 413 U.S. at 56.

The context in which the sexually-oriented matter appears is critical to the determination whether, viewed "as a whole," the material is obscene. James Joyce's *Ulysses* might be judged obscene on the basis of isolated passages which were lifted out of context and described in affidavits or oral testimony; viewed as a whole, however, *Ulysses* is not obscene. *United States* v. *One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D. N.Y.), affirmed, 72 F.2d 705 (C.A. 2). Although the films involved in this case are certainly not in the same literary class as *Ulysses,* the principle is the same: the materials must be viewed to determine whether, "as a whole," they are outside the scope of the First Amendment.

The position we have outlined above is the traditional one. Since *Roth* appellate courts routinely have looked at the materials in question to determine whether they are obscene. See generally *United States* v. *Linetsky, supra; United States* v. *Thevis,* 526 F.2d 989 (C.A. 5); *United States* v. *Gates,* 481 F.2d 605, 606 (C.A. 5). The practice of examining the materials themselves has been so nearly uniform that, so far as we can determine, the instant case is the first in which the court of appeals chose to sustain a conviction without examining the materials. It did so without explanation.

The only other court of appeals to decide that examination of the materials is unnecessary is *United States* v. *American Theatre Corp.,* 526 F.2d 48 (C.A. 8), petition for a writ of certiorari pending, No. 75-985. That court acknowledged (*id.* at 49) that it "has the obligation to independently determine whether the questioned material is obscene," but it asserted (without supporting reasoning) that it could discharge that obligation without examining the materials. Three judges dissented from the denial of rehearing *en banc*; they argued that the appellate court has an obligation to examine the materials in order to carry out their duty to use " 'sensitive tools' " to separate legitimate speech from unprotected speech (*id.* at 51, quoting from *Speiser* v. *Randall,* 357 U.S. 513, 525).[21]

Examination of the materials not only is supported by the need to use "sensitive tools" to distinguish between obscenity and protected speech, but also is in harmony with the practice of this Court. To the best of our knowledge, the Court has viewed the

---

[21] It does not follow, however, that *American Theatre* was wrongly decided on its facts. The court of appeals relied on a stipulation of the contents of the films in finding them to be obscene. As we have suggested, review of stipulated facts may be an adequate substitute for an examination of the materials, because a defendant presumably would not stipulate to a description of the materials that did not fairly represent them. The more narrow question in *American Theatre,* therefore, is whether defendants can strategically rely on the stipulation in the district court (so that the jury does not see the films) and then, in a change of strategy, ask the court of appeals to make a *"de novo"* judgment on obscenity.

materials themselves whenever, in a case accepted for plenary review, it has been called upon to determine whether the materials are obscene. See, *e.g.*, *Jenkins* v. *Georgia*, *supra*, 418 U.S. at 158: *Hamling*, *supra*, 418 U.S. at 100-102; *Miller*, *supra*, 413 U.S. at 29-30; *Manual Enterprises, Inc.* v. *Day*, *supra*, 370 U.S. at 488. We believe that the court of appeals should have followed the same course, and that its judgment should be vacated and the case remanded with instructions to examine the films.[22]

Nothing we have said here is intended to suggest that this Court also has an obligation to examine allegedly obscene materials in every case. See, *e.g.*, *Jacobellis* v. *Ohio*, *supra*, 378 U.S. at 189, 190 n. 6 (plurality opinion); *Jenkins* v. *Georgia*, *supra*, 418 U.S. at 163 (Brennan, J., concurring). There is an important distinction between the obligations of an appellate court of first instance and the obligations

[22] This can be accomplished without a new trial. Consequently, no prosecutorial or judicial resources have been expended unnecessarily on this account. The ease with which this error can be rectified is an important factor that led to our decision not to support the decision of the court of appeals on this issue.

If the Court agrees with the arguments we have made at pages 15-34, *supra*, a new trial will be required. In that event, we believe that this Court should instruct the court of appeals to examine the materials on remand before returning the case to the district court for another trial. It would be a waste of scarce judicial resources to hold a new trial if, on appeal and after examination of the films, the court of appeals were to determine that one or more of them is protected by the First Amendment.

of this Court.[23] Review by this Court of federal criminal convictions is discretionary; a case comes here only after one or more lower courts already has made an independent determination that the materials in question are obscene. There is no more need for this Court to examine each film or book—which amounts to deciding the case on its merits—than there is for it to decide on the merits all cases of any other legal category. See *J-R Distributors, Inc.* v. *Washington*, 418 U.S. 949, 950 (opinion of White, J.); *Liles* v. *Oregon*, No. 75-983, certiorari denied, May 3, 1976 (opinion of Stevens, J.).

The courts of appeals have a duty to decide on the merits all cases brought to them. It is that duty, a duty this Court does not share in most cases, that compels them to examine the allegedly obscene materials. A single review of that question by an appellate court should be sufficient in all but the exceptional case; there is therefore no need for this Court to examine the materials once again.

III

THE JURY WAS PROPERLY INSTRUCTED TO APPLY THE CONTEMPORARY COMMUNITY STANDARDS OF THE JUDICIAL DISTRICT IN WHICH THE TRIAL TOOK PLACE

The jury was instructed to assess the films in this case in accordance with the contemporary community standards "generally held throughout the Eastern

[23] Cf. *Ross* v. *Moffitt*, 417 U.S. 600.

District of Kentucky" (App. 86). Petitioners contend that the court should have instructed the jury to apply the standards of the Cincinnati metropolitan area, where many of the jurors lived and worked.[24]

This Court's cases offer no support to petitioners. In fact, the district court appears to have anticipated *Hamling* in this regard; the Court indicated in *Hamling* that the relevant community ordinarily should be the judicial district in which the trial took place. The Court wrote (418 U.S. at 105-106) that since petitioners in *Hamling* had been tried in the Southern District of California, "and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that 'community' upon which the jurors would draw."

Petitioners respond that the jury in their case was drawn from Covington, Kentucky, that Covington is a suburb of Cincinnati, Ohio, and that half of the jurors were employed in Cincinnati. Assuming *arguendo* that these assertions are correct,[25] they would

[24] Petitioners sought such an instruction at trial (Tr. 920-921).

[25] Nothing in the record supports the statement of petitioners (Br. 17) that half of the jurors were employed in Cincinnati. Petitioners also assert (*ibid.*) that the jury panel was drawn only from the "metropolitan Covington area." Petitioners do not define this term. The jury list maintained by the district court shows that six of the jurors resided in Covington, four resided outside Covington but in Kenton County, of which Covington is a part, and two resided in Boone

demonstrate that the standards of the Cincinnati metropolitan area were *a* possible act of standards for the jury to use. They would not demonstrate that they were the *only* possible community standards to which the jury might refer.

In many cases more than one community may be appropriate. Each juror will come from a political community, from a judicial district, from a "metropolitan area," and from a State. Each of the jurors will belong to all of these "communities" and to others as well. None of them is a perfectly representative community, for none exists. No juror will be familiar with the entire "community."

Petitioners argue that it is difficult for jurors who reside in Covington to know the standards that prevail in the rural portions of the State that are included in the judicial district. But it would be equally difficult for a juror to know the community standards of the entire State of California; a jury instruction referring to statewide standards was upheld in *Miller*. An instruction referring to national

County, adjacent to Covington. We are lodging a copy of that list with the Clerk of this Court. The jurors were drawn from a pool that, under 28 U.S.C. 1861, is required to include individuals from throughout the judicial district. The jury list from which petitioners' jury was selected contains 61 names, including individuals from Campbell, Bracken, Boone, Robertson, Kenton, Pendleton and Mason counties, which span much of northern Kentucky. Petitioners did not challenge this jury array prior to trial as insufficiently comprehensive, and they cannot do so now. 28 U.S.C. 1867(e).

standards was upheld in *Hamling*; even though national standards are not precisely ascertainable, the charge fulfilled the purpose of the community standards charge. What is more, an instruction referring to "community standards" without specifying any community was referred to without disapproval in *Jenkins* v. *Georgia*, *supra*, 418 U.S. at 157.

In this case the charge to the jury fulfilled the purpose of the community standards instructions: to ensure that the allegedly obscene material "will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one." *Miller*, *supra*, 413 U.S. at 33. The instruction permitted each juror "to draw on knowledge of the community or vicinage from which he comes * * *." *Hamling*, *supra*, 418 U.S. at 105. It may well be that in some metaphysical sense the vaguely-defined "metropolitan Cincinnati area" is a "better" community for this purpose than is the Eastern District of Kentucky, but the difference between the two is immaterial for constitutional purposes.[26]

The instructions given in this case served the purpose of making sure that the materials would not be

[26] We said in *Hamling* (Br. 28-29) that "the use of the judicial district as the relevant community is more realistic and practical than a state or the city where the court is sitting. The jurors in federal cases are drawn from a cross-section of the 'community' in the judicial district (see 28 U.S.C. (Supp. II) 1861), and are therefore familiar with the standards of that 'community.'"

judged on the basis of the sensibilities of isolated individuals. They made sure, to the extent possible, that the jurors would draw their standards from the community around them rather than from their own subjective feelings. Like the instructions in *Hamling*, they were constitutionally adequate.[27]

[27] Petitioners have not suggested any reason to believe that the instruction they contend for would have made any difference in the jury's deliberations. Indeed, one expert appearing on petitioners' behalf testified that the community standards in Northern Kentucky do not differ significantly from those of the surrounding region (Tr. 401-402). Another expert based his opinion mainly on the basis of standards in Cincinnati (Tr. 320-323, 334). Nothing in the record suggests that the community standards of Cincinnati differ significantly from those in the adjoining Eastern District of Kentucky.

CONCLUSION

The judgment of the court of appeals should be vacated. The case should be remanded to that court with instructions to view the films and, if it concludes after that view that they may be found obscene under the *Roth-Memoirs* standards and the *Miller* standards, to remand to the district court for a new trial under the *Roth-Memoirs* standards.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

FRANK H. EASTERBROOK,
Assistant to the Solicitor General.

JEROME M. FEIT,
JAMES A. HUNOLT,
Attorneys.

JULY 1976.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 215420 277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976
NO. 75-708

STANLEY MARKS, HARRY MOHNEY,
GUY WEIR, AMERICAN AMUSEMENT CO., INC.,
and AMERICAN NEWS CO., INC.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Motion for Leave to File Brief of Citizens for Decency Through Law, Inc., as Amicus Curiae in Support of the Respondent United States of America, With Brief Annexed.

CHARLES H. KEATING, JR.
919 Provident Tower
Cincinnati, Ohio 45202

JAMES J. CLANCY
9055 La Tuna Canyon Road
Sun Valley, California 91352

Counsel for Citizens for Decency through Law, Inc.

SUBJECT INDEX

Motion

Brief Amicus Curiae

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES (cont'd.)

TABLE OF AUTHORITIES (cont'd.)

TABLE OF AUTHORITIES (cont'd.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976
NO. 75-708

STANLEY MARKS, HARRY MOHNEY,
GUY WEIR, AMERICAN AMUSEMENT CO., INC.,
and AMERICAN NEWS CO., INC.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Motion for Leave to File Brief of Citizens for Decency Through Law, Inc., as Amicus Curiae in Support of the Respondent United States of America.

Interest of Amicus Curiae.

Citizens for Decency through Law, Inc.,[1] hereinafter referred to as C.D.L. respectfully

---

1/Citizens for Decency through Law, Inc. (formerly Citizens for Decent Literature, Inc.) an Ohio Corporation, with local affiliates throughout the United States, is a non-profit, non-sectarian, and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the support of this nation's obscenity laws by cooperating with law enforcement in the enforcement of the obscenity laws.

requests leave of Court, under Rule 42.2 of the Revised Rules of the Supreme Court of the United States, to appear as amicus curiae and to file a brief in support of the United States of America, the Respondent in the above-entitled cause.

C.D.L.'s request, at this late date, to appear as amicus curiae on behalf of the Respondent United States of America, arises out of its having received information that, approximately two months ago, the Solicitor General of the United States filed a Brief on the Merits for the Respondent United States of America, which concedes error on the part of the Court of Appeals for the Sixth Circuit below, and urges reversal of the judgment and remand of the case for retrial.[2/]

2/On November 13, 1975, Petitioners in the above-entitled cause filed their petition for a writ of certiorari to the U.S. Court of Appeals for the Sixth Circuit to review the opinion and judgment in U.S. v. Stanley Marks et al., 520 F.2d 913, (July 30, 1975) which, in a 2-1 decision (Weick and Engel, with McCree dissenting) had affirmed the judgment of conviction entered by U.S. District Judge Mac Swinford in October of 1973. That petition presented three questions:

1. Whether defendants in obscenity prosecutions which are founded upon conduct occurring prior to this Court's decisions in Miller v. California and its companion cases are entitled to jury instructions founded upon the Roth-Memoirs obscenity formulation prevailing at the time of their conduct?

Thereafter, moving party herein obtained a copy of Respondent's Brief on the merits and, after an examination of its contents, was satisfied that the concession of the Solicitor General constitutes serious error, and that the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

The Solicitor General's willingness to concede error has created a void and has deprived the

---

2. Whether an appellate court, in performing its duty enunciated in Jacobellis v. Ohio, 378 U.S. 184 (1964), of independantly determining the issue of obscenity, must itself view the materials charged as obscene?

3. Whether a jury may be instructed to determine the issue of obscenity on the basis of community standards based upon a community comprised of the precise geographical boundaries of a federal judicial district when all of the jurors are both drawn from and constantly exposed to the influences of other communities?

On March 1, 1976, this Court granted a writ of certiorari in Stanley Marks et al. v. U.S. ___U.S.___ 47 L.Ed.2d 347 ___S.Ct.___ (Mar. 1, 1976) and on May 14, 1976, Petitioner Stanley Marks et al. filed their Brief on the merits. On or about July 9, 1976 the Solicitor General Robert H. Bork filed a Brief for the Respondent United States of America wherein he conceded error and urged that the judgment of the Court of Appeals should be vacated and the case remanded to the Court of Appeals for viewing of the films and, on further reconsideration, further remand to the U.S. District Court for a new trial under the Roth-Memoirs standards.

people of full representation in support of the judgment of the Court of Appeals below, and this Court of the "adversary" type of advocacy which is essential to a correct determination of the proper rule of law.

If the Solicitor General's concession is to be given effect, the resulting rule of law will deal a major blow to the federal government's efforts to apply obscenity controls in pending prosecutions and in convictions presently on appeal.[3/]

Moving Party contends that the most significant issue in this case is that which has been designated as Question 1 in the Petition for a Writ of Certiorari; namely,

> 1. Whether defendants in obscenity prosecutions which are founded upon conduct occurring prior to this Court's decisions in Miller v. California and its companion cases are entitled to jury instructions founded upon the Roth-Memoirs obscenity formulation prevailing at the time of their conduct?

The Solicitor General has taken the position in the Respondent's Brief on the Merits, that the trial court erred in instructing the jury on

3/See Daily and Weekly Variety news articles, reporting on the Solicitor General's actions, at Exhibit "A" to the Brief herein.

"Miller" standards, and was required to instruct the jury in what has generally (and erroneously) been described as "Memoirs" standards. C.D.L. contends that the trial court was correct.

Moving party disagrees with the position taken by the Solicitor General on Question 2, and contends that the Court of Appeals was correct in its findings that the record is sufficient, and that there was no need to examine the films.

On Question 3, moving party agrees with the Solicitor General's position that the jury was properly instructed to apply the contemporary community standards of the judicial district in which the trial took place.

Additional arguments in support of this motion appear at the Introduction to the Brief Amicus Curiae, annexed hereto.

It is submitted that the arguments presented herein are of primary importance and should be considered by this Court in ruling on the merits. It is respectfully requested that permission be granted under Rule 42.2 to file the within tardy Brief Amicus Curiae in support of the Respondent United States of America.

Respectfully submitted,

Charles H. Keating, Jr.
919 Provident Tower
Cincinnati, Ohio

James J. Clancy
9055 La Tuna Canyon Road
Sun Valley, California

Counsel for Citizens for Decency Through Law, Inc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976
NO. 75-708

STANLEY MARKS, HARRY MOHNEY,
GUY WEIR, AMERICAN AMUSEMENT CO., INC.,
and AMERICAN NEWS CO., INC.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Brief Amicus Curiae of Citizens for Decency Through Law, Inc., in Support of the Respondent United States of America.

INTRODUCTION

C.D.L. contends that the Solicitor General's analysis as to Question 1 is prejudicially in error in a number of particulars. See Brief Amicus Curiae, hereinafter, at Point I A through I L (pages 21 - 54). With particular reference to Point I A (See pages 21 - 26), C.D.L. submits that the analysis of the Solicitor General is fundamentally unsound in its willingness (1) to accept

without question and continue the error of long standing duration (10 years) regarding what Justices Brennan, Warren and Fortas actually said in their opinion in the Civil Injunction lawsuit, A Book Named "John Cleland's Memoirs of A Woman of Pleasure et al. v. Attorney General of the Commonwealth of Massachusetts, 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975, and (2) to accept the proposition that the "civil" standard of "utterly without redeeming social value" was intended to have the same application in a "criminal" case. The real meaning of the so-called "Memoirs" opinion, authored and concurred in by only those three justices, has been obscured in the 10 years of litigation and confusion which the loose language of that opinion and the configuration of that case has engendered.

The erroneous rule of law announced by the First, Fifth, Ninth and District of Columbia Circuits in U.S. v. Jacobs, 513 F.2d 564 (9th Circuit. 1975), U.S. v. Wasserman, 504 F.2d 1012 (5th Circuit 1974), U.S. v. Sherpix, Inc., 512 F.2d 1361 (D.C. Circuit 1975) and U.S. v. Palladino, 490 F.2d 499 (1st Circuit 1974), upon which the Petitioners herein rely, is the direct result of that confusion. If this Court is to put an end to the "Memoirs" controversy, that mistake must be dealt with in a logical manner; that is, in the background which existed ten years ago,

with this Court reexamining the factual settings, questions presented, and arguments made by counsel in all three of the obscenity cases which were argued as a group and decided as a group during the 1965 October Term. See A Book Named "John Cleland's Memoirs of a Woman of Pleasure" et al. v. Attorney General of the Commonwealth of Massachusetts, 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975; Ginzburg v. U.S., 383 U.S. 463, 16 L. Ed.2d 31, 86 S.Ct. 942; and Mishkin v. New York, 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958 (March 21, 1966).[1/] By reconciling the opinions of the three Justices (Brennan, Warren and Fortas) in

1/ The confusion started when all three of the governmental attorneys in the Fanny Hill, Ginzburg and Mishkin cases conceded without argument that there were three separate tests. See transcript of the oral arguments in the Fanny Hill case on Dec. 7, 1966 at page 9. See also, during the following term, "Motion for Leave to File Brief of Citizens for Decent Literature, Inc., an Ohio Corp. as Amicus Curiae and Brief" in Aday et al. v. United States of America, No. 149 (October Term 1966) at page 20 through 32.

In a civil case, (Fanny Hill), the "Memoirs" requirement that the 3 criteria must "coalesce" is consistent with the "Memoirs" requirement that "Each of the three federal constitutional criteria is to be applied independently." Not so, in a criminal case, where the concepts of "coalesce" and "applied independently" are at war with one another, as can be seen from the arguments on "social value" in Ginzburg and the ensuing opinion in that case. (See Brief Amicus Curiae herein, at Appendix B, pages B-35 - B-39.)

Memoirs, with their rulings in Ginzburg and Mishkin, the Memoirs error can be exposed, and a foundation laid for a logical explanation as to why the "utterly without redeeming social value" was never an independent test in criminal cases, and why Judge Mac Swinford was correct in his ruling in Marks v. U.S. To say that Mac Swinford, in the criminal trial below, was required to give a jury instruction that the material must be "utterly without redeeming social value", because of the result and a minority, three judge opinion to that effect in the civil injunction "Memoirs" action, without explaining why that same test was not a requisite in the companion criminal cases of Ginzburg,supra, and Mishkin, supra, decided by the same court on the same date in clear-majority-decisions, is to concede a major point without the necessary foundation having been laid.

In Ginzburg,supra, the terms "redeeming social importance" and "utterly without social importance" were fundamental issues upon which the arguments centered. (See Brief for the Petitioners, Ginzburg et al. at pages 29-33, Point I B "Redeeming Social Importance"; Brief Amicus Curiae of C.D.L. in Support of Respondent at pp. 68-72, Point II E "Social Importance", Point II E-1 "It is not determined in a vacuum", and Point II E-2 "Slight social importance does

not exculpt"; and Reply Brief of Amicus Curiae C.D.L. in Support of Respondent at pages 1-5, Point I "The Government Did Not Concede That Any of the Works had 'Redeeming Social Importance'.")[1a/] Yet Justice Brennan who authored the Ginzburg opinion and Justices Warren and Fortas who joined the same, made no reference to the "social importance" requirement, except at page 38, where

---

1a/Amicus Curiae participated as an Amicus Curiae in all three of the cases which were decided on March 21, 1966. In Ralph Ginzburg et al. v. U.S., October Term 1965, No. 42, see:

(a) Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondent.

(b) Reply Brief of Amicus Curiae Citizens for Decent Literature, Inc., an Ohio Corporation in Support of Respondent.

In A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts, October Term 1965, No. 368, see:

(a) Motion for Leave to File and Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Appellee.

(b) Motion for Special Leave to File and Supplemental Brief of Amicus Curiae Citizens for Decent Literature, Inc., an Ohio Corporation, in Reply to Appellant's Supplemental Brief.

In Mishkin v. New York, October Term 1965, No. 49, see:

(a) Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Appellee.

Justice Brennan noted:

> "And the circumstances of presentation and dissemination of material are equally relevant to determine whether social importance claimed for material in the court room was, in the circumstances, pretense or reality-whether it was the basis upon which it was traded in the market place, or a spurious claim for litigation purposes." (Our emphasis).

Amicus Curiae disagrees with the position taken by the Solicitor General on Question 2, which is phrased in the Petition for a Writ of Certiorari as:

> "2. Whether an appellate court, in performing its duty enunciated in Jacobellis v. Ohio, 378 U.S. 184 (1964), of independently determining the issue of obscenity, must itself view the materials charged as obscene?"

and contends that the Court of Appeals was correct in its findings that the record is sufficient, and that there was no need for the Court to examine the films. (See Brief Amicus Curiae, hereinafter, at Point II, pages 54-56).

Given the record herein, C.D.L. submits that it is intellectual nonsense to suggest that the Court of Appeals' position "reflected insufficient attention to the First Amendment values

involved" (Brief for the U.S. at p. 35 fn. 20).

On Question 3, moving party agrees with the Solicitor General's position that the jury was properly instructed to apply the contemporary community standards of the judicial district in which the trial took place. The most logical reason for applying that rule is the rationale applied by seven justices of the Court of Appeals, Fifth Circuit, sitting en banc in U.S. v. Groner, 479 F.2d 577 (May 22, 1973) at page 583:

> "Our concept of the community is suggested by the declaration of our national policy in the Jury Selection and Service Act of 1968, 28 U.S.C.A. section 1861 (Sup. 1972) from which we quote:
>
> 'It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.'" (Emphasis theirs.)

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 520 F.2d 913 (See also Pet. App. at pages A1-A19).[1b/] The pre-trial memorandum of the trial judge (the late U.S. District Judge Mac Swinford) is reported at 364 F.Supp. 1022 (See

1b/"Pet. App." refers to Appendix A to the petition.

also App. at pages A45-A58).[2/]

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1975. A petition for rehearing was denied on September 15, 1975. On October 6, 1975, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including Nov. 14, 1975. The petition was filed on Nov. 13, 1975 and was granted on March 1, 1976. The jurisdiction of this Court rests upon 28 USC 1254(1).

QUESTIONS PRESENTED

1. Whether the U.S. District Court acted properly in charging the jury on the standards announced in Miller v. California, 413 U.S. 15, where both the conduct which was the subject of the criminal charge, and the federal indictment which was thereafter returned, took place prior to the Miller decision?

2. Whether in reviewing an obscenity conviction based upon the exhibition of obscene films, an appellate court is required to view such films, where the appellate court finds and determines from the record that such films are hard-core pornography, and the record clearly supports such finding?

3. Whether the jury was properly instructed

2/"App." refers to the Joint Appendix.

to assess the materials in terms of the community standards of the judicial district from which the jurors were selected and in which the trial was held?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, Clause 3 of the Constitution provides in pertinent part:

> No . . . ex post facto Law shall be passed.

The First Amendment to the Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

18 U.S.C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than

$10,000 or imprisoned not more than five years, or both.

18 U.S.C. 1465 provides in pertinent part:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lacivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT OF FACTS

1. The Petitioners' Conduct.

In early 1973, the Cinema X Theatre in Newport, Kentucky, was managed by petitioner Marks. (Tr. 434, 559-560)[3/] Petitioner Mohney owned the Cinema X Theatre and was the sole owner of American Amusement Company, Inc., and American News Company, Inc., the corporate petitioners herein. The corporate petitioners had their offices in Durand, Michigan (G. Exhs. 48, 49). Petitioner

3/ "Tr." refers to the transcript of the trial. "G. Exh." refers to exhibits introduced by the government at trial. "Pet. App." refers to the Petition. "App." refers to the Joint Appendix.

Weir was the general manager and president of American Amusement (G. Exhs. 26, 27, 49).

Petitioner Weir scheduled movies for the Cinema X, and the booking of those movies was accomplished by American Amusement (Tr. 561-566). Weir also arranged for advertising of the theater (G. Exhs. 26, 27). Cinema X employees were paid by petitioner American News (Tr. 122, 437).

The films "Deep Throat" and "Swing High", as well as a number of previews,[4/] were shown at the Cinema X in late January or in February 1973 (Tr. 500-501; G. Exh. 55). They were supplied by American Amusement and were sent to Cinema X from either Durand, Michigan, or Clarksville, Indiana (Tr. 446-448, 450, 459, 461-462, 488-489)[5/]

2. The Search Warrant, Indictments, and Pre-Trial Motions.

On February 26, 1973, an Assistant United States Attorney applied to a federal magistrate for a warrant authorizing the search of the Cinema X, and the seizure of certain films (App. 10). Special Agent Vernon R. Glossup of the Federal Bureau of Investigation submitted an affidavit (App. 14-26), describing in detail the

4/ The previews at issue here are entitled "Teenage Cowgirls", "Black on White", "A Few Bucks More", "Memoirs of a Madam", and "Doctor's Disciples."

5/ American Amusement owned a theater in Clarksville, Indiana (Tr. 647-648).

film "Deep Throat" and the previews "Teenage Cowgirls", "Black on White", "A Few Bucks More", "Let Me Count the Lays", and "Memoirs of a Madam", which he had viewed at the Cinema X Theatre, 716 Monmouth Street, Newport, KY, on Friday, February 23, 1973 at about 8:00 P.M. Special Agent Ronald F. Selby also submitted an affidavit (App. 11-13) describing in detail the film "Swing High" and the preview "Doctor's Disciples", which he had viewed at the Cinema X Theater on the afternoon of Friday, February 23, 1973. He also stated in his affidavit that he viewed a s d film "Deep Throat" and the same previews described in Special Agent Glossup's affidavit.

The United States Magistrate notified petitioner Marks that an adversary hearing would be held the next day to determine whether the search warrant would be issued (App. 4-9). After the adversary hearing, the Magistrate issued the search warrant which was executed on February 27, and a return made on February 28 (App. 29-31).

On April 27, 1973, an indictment was returned in the United States District Court for the Eastern District of Kentucky, charging petitioners with conspiracy to transport obscene materials in interstate commerce, in violation of 18 U.S.C. 371, and with transportation of obscene materials in interstate commerce, in violation of 18 U.S.C.

1465 (App. 33-44).

Petitioners made a number of pretrial motions, including a motion to dismiss the indictment, which was denied on Oct. 5, 1973 in a written memorandum (App. 47-52). After rejecting a number of arguments similar to arguments ultimately rejected by this Court in Hamling v. United States, 418 U.S. 87, the District Court rejected petitioners' argument "that since Miller (v. California, 413 U.S. 15) formulated a new test of obscenity, prosecution of (petitioners) for conduct prior to that opinion would invoke the constitutional proscription of ex post facto culpability". The court observed that the Ex Post Facto Clause applies only to Acts of Congress, and stated: (App. 49)

> Although Bouie v. City of Columbia, 378 U.S. 347 (1964), did hold that a retroactive application of a court interpretation may offend the Due Process Clause, it is evident that the factors present in the obscenity area render that case easily distinguishable; the Bouie holding should be applied only to decisions which are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue . . . ." Id. at 354. As admitted by the (petitioners), the previous uncertainty in

the realm of obscenity has only been settled by the recent Supreme Court decisions. The Miller group did not create a new definition of illegal conduct, but merely clarified earlier concepts of obscenity of which the (petitioners) were constructively aware. Rosen v. United States, 161 U.S. 29 (1896); Nash v. United States, (229 U.S. 373); United States v. Wurzbach, (280 U.S. 396). Further, the Court's action in remanding Miller and its accompanying cases to the lower courts for reevaluation in light of the clarified standards intimates that the use of the Miller standard in the case at bar is entirely proper; prospective application would have been decreed if constitutional violation had been feared.

3. The Trial.

The trial commenced on Tuesday, October 9, 1973 and lasted until Friday, October 19, 1973. The films, which were shown to the jury, are described by the Court of Appeals in its opinion (See, infra, at page 16).

Petitioners presented the testimony of a psychologist, a minister, a psychiatrist, a sociologist, and an English teacher. These witnesses were of the view that the films were not patently offensive, did not appeal to the prurient interest

under contemporary community standards,[6] and had serious artistic, literary, and scientific value (Tr. 353-355, 407-410, 745-755, 812-814, 825-835).

The District Court instructed the jury that the test for obscenity is "(w)hether to the average person, applying contemporary community standards, the film taken as a whole appeals to the prurient interest" (App. 84). The court told the jury that it should find that the materials meet this test if three elements exist (ibid.):

> (1) whether the average person, applying contemporary community standards would find that the film, taken as a whole, appeals to the prurient interest in sex;
>
> (2) whether the film depicts or describes, in a patently offensive way, sexual conduct, including but not limited to ultimate sexual acts, normal or perverted, actual or simulated, masturbation, excretory functions, and the lewd exhibition of the genitals; and
>
> (3) whether the film, taken as a whole, lacks serious literary, artistic, political or scientific value.

6/ Petitioners' experts based their opinions on standards in the Covington, Kentucky, area where the trial occurred, as well as on standards in Cincinnati, Ohio, Minnesota, Maryland, and the nation as a whole (Tr. 328-329, 334, 348, 393, 739-740, 808).

The jury was instructed on the "average person" requirement as follows (App. 85):

> The "average person" is, of course, a hypothetical person. The phrase means a person with an average interest and attitude toward sex: not a libertine, not a prude, not a person who is preoccupied with sex, not a person who rarely if ever thinks about sex, not a person who thinks sex is the most important thing to be discussed. The phrase means a normal individual of average sex instincts; not one who is oversexed, not one who is under-sexed, not one who thinks sex is the most important factor in life, and not one who is afraid of sex or repelled by sex or ignorant of sex or bored by sex. The phrase means, in short, a normal, healthy, average adult man or woman with normal, healthy, average attitudes, instincts, and interests toward sex.

The jury was instructed that the "contemporary community standards" to which it should refer are the standards generally held in the Eastern District of Kentucky. The Court enlarged on that instruction in the following manner (App. 86-87):

> "Contemporary community standards" means the standards generally held throughout the Eastern District of Kentucky. We are not

> measuring this term 'contemporary community standards' directly with what happened in Newport or on Monmouth Street, but it includes the whole Eastern District of Kentucky. You people on the jury are from different parts. Some of you are from Newport, Campbell County, maybe Monmouth Street, I don't know; others of you from out in Boone County, some in Bracken, some in Mason. This District extends to sixty-seven counties in Kentucky, goes throughout the whole eastern district of Kentucky, as I explained that to you when you qualified as jurors. So you are not to say, "Well, a thing like that wouldn't offend a person or even be obscene maybe under some conditions, but on the other hand, there are things we know to some people more prudish that even something of less significance then might be drawn from these films would be considered obscene . . . ."

and (App. 88):

> "If you find that the films in this Indictment exceed substantially the limits of candor in the description or representation of sex which is acceptable in the Eastern District of (T. 891) Kentucky, then you may find the film to be patently offensive.
>
> "In determining contemporary standards,

you should take into account such things as dress styles, which include hot pants and see-through blouses; topless and bottomless bars; adult theaters which exhibit films dealing candidly with sex matters; adult book stores which sell publications containing pictorial and verbal portrayals dealing with sex; adult motion picture theaters which display films containing explicit, sexual conduct.

"Your own personal and social views on the press materials charged as obscene in the indictment may not be considered. Thus, whether you believe that the press materials are good or bad is of no concern; so too, you may not consider whether in your opinion the press materials are moral or immoral; whether they are likely to be helpful or injurious to the public morals. Similarly, whether you like or dislike the press materials, whether they offend or shock you, may not be considered by you. You may think the press materials are immoral, shocking or offensive, and you must acquit the defendants if the press materials are not obscene, as the Court has defined that term for you."

and (App. A94):

"The United States, on the other hand,

says that by the very showing of these films, they show a lack of literary, artistic, political or scientific value of any kind, that they are pure filth and that they are the kind of thing that this statute was passed to keep from being shown in the community. The law makes a distinction by saying that apparently from decisions of the court things that might be shown in one community could not be shown in another community. In other words, a visit to a contemporary community, as I say the Eastern District of Kentucky, and more or less leaves it up to the juries, those charged with making such a decision, as to whether or not it violates social ideas of that community taken in the terms that I have outlined it to you, the average person. So you are to decide very simply, you saw the films, you know what they are, not judging them particularly by your own standards, but are they of such a nature that you believe that they offend, as charged in the statute, are obscene to the average person in this Eastern District of Kentucky. If you believe that they do and you believe that the interstate transaction has been established, the United States contends that the evidence clearly establishes that fact to the exclusion of a

reasonable doubt and that the Defendants are guilty and that you are to find them guilty. If you do not so believe, you should find them not guilty."

With regard to the third element of the test for obscenity, the jury was instructed (App. 89): 7/

> Obscenity is excluded from constitutional protection because it is without serious social importance. Obscene utterances are no essential part of an exposition of ideas and are of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Of course, the mere fact that a film deals with sex does not mean that it cannot have value to society. Indeed, such a film can have social importance if it portrays sex in a manner that advocates ideas or that has literary, scientific, political or artistic

7/ See the instruction in United States v. Hill, 500 F.2d 733 at 737 where, on similar facts and on almost an identical instruction, the Fifth Circuit said:

> Although the Court first instructed the jury that the test of whether the material was obscene depended on the existence of the three elements of the Miller standard, it then went on to satisfactorily, we think, instruct the jury as to the social value element found in Roth-Memoirs.

> value. It is for you to determine whether the film in issue in this case is of such value to society. If you find that it lacks serious literary, artistic, political, or scientific value, you can brand it obscene. If you find that it does have those, one or more of those adjectives that I have given you, then you should determine that it is not obscene.

The jury acquitted petitioners of the charge in Count 8 of the indictment, which involved the film preview "Let Me Count the Lays" (Tr. 939-943). The jury returned a verdict of guilty against petitioner American News on the conspiracy count. The other four petitioners were convicted on seven substantive counts and the conspiracy count (ibid.). Petitioners Marks, Mohney and Weir were sentenced to concurrent terms of 90 days' imprisonment and were fined $16,000. Each corporate petitioner was fined $5,000 on the conspiracy count. Petitioner American Amusement was fined $14,000 for its substantive convictions (Tr. 944-950).

4. The Decision by the Court of Appeals.

On appeal, the Court of Appeals rejected petitioners' argument that the charge to the jury should have been based upon the standards of Roth v. United States, 354 U.S. 476, as modified by

the plurality opinion in Memoirs v. Massachusetts, 383 U.S. 413, rather than upon the standards of Miller v. California, 413 U.S. 15 (Pet. App. A11-A18). The court observed that the Roth-Memoirs test had never commanded the support of more than three Justices at one time, and that it "imposed a burden virtually impossible to discharge under our criminal standards of proof" (Pet. App. A12). The court also stated that it believed that the District Court was required to give the charge it gave "by the specific terms of the remand in Miller" (Pet. App. at A14). Finally, the court indicated that the difference between the Roth-Memoirs standards and the Miller standards was immaterial in this case because "(i)t is plain to us that the material in the present case was obscene, irrespective of which standards are applied" (Pet. App. at A12).

The Court of Appeals described the films in its opinion as follows (Pet. App. A3, fn. 1):

> A composite of all of the films and film previews depict acts of cunnilingus, fellatio, onanism, sodomy, male ejaculation, sexual intercourse and group sex.
>
> Deep Throat: portrayed a young female in quest of sexual fulfillment, which had eluded her because her clitoris was lodged in her throat. Scenes depicted males and

> females engaged in cunnilingus, sodomy, group sexual encounters, where sodomy and fellatio were simultaneously practiced, sexual intercourse and male ejaculation.
>
> Swing High: depicted a group sexual encounter where cunnilingus, fellatio, sexual intercourse, masturbation, onanism, and sodomy were practiced.
>
> Previews
>
> Doctor's Disciples: depicted acts of onanism, sexual intercourse, and male ejaculation.
>
> Teenage Cowgirls: two very young females are shown in close up scenes of fellatio and sexual intercourse.
>
> Black on White: depicted various acts of fellatio, cunnilingus and sexual intercourse by a white male with a black female and a black male with a white female.
>
> Memoirs of a Madam: portrayed three couples on a bed in various stages of nudity engaging in oral and genital acts, and with one female masturbating with a vibrator. This preview also depicted a black male and white female engaged in sexual intercourse.
>
> A Few Bucks More: portrayed fellatio, and male enjaculation (sic).

The Court reached its decision that the films were

unprotected by the First Amendment under either standard from the record itself and that an examination of them was not necessary for decision (Pet. App. at A19). The Court stated (Pet. App. at A5):

> ". . . The action of the Magistrate in issuing the search warrant was supported by the affidavits of Special Agents Glossup and Selby. These affidavits clearly indicated that the films involved hard core pornography of the worst sort.
>
> "The showing of the film was not protected by the First Amendment. It was not required that the Magistrate view the films. He could accept the sworn statements of the two Special Agents which graphically portrayed the films as well as the sound features. The Special Agents were also examined and cross-examined at the hearing."

and (Pet. App. at A14):

> "There can be no question but that the material in 'Deep Throat' was hard core pornography. It was the type referred to by Mr. Justice Stewart in Jacobellis v. Ohio, 378 U.S. 184, at 197, 84 S.Ct. 1676, at 1683, 12 L.Ed.2d 793 (1964), when he stated we 'know it when (we) see it.' The jury saw it when it reviewed the film and had no difficulty in assessing its character."

On the sufficiency of the Record, the Court of Appeals held (Pet. App. at A15):

> ". . . In Hamling, the Court held, 418 U.S. at 108, 94 S.Ct. at 2903:
>
> '. . . (W)e hold that reversal is required only where there is a probability that the excision of the references to the "country as a whole" in the instruction dealing with community standards would have materially affected the deliberations of the jury. (Citing authority) . . . Our examination of the record convinces us that such a probability does not exist in this case.'
>
> "Our examination of the record in the present appeals convinces us that such a probability does not exist here, for it is clear that under either Roth-Memoirs or Miller standards the material was obscene."

The Court of Appeals concluded that the District Court correctly had instructed the jury to apply the community standards of the judicial district where the trial was held (Pet. App. A10-A11). It held that the relevant community standards are those of the judicial district where the jurors reside, and not the standards of a nearby metropolitan area where some of the jurors may be employed.

Judge McCree dissented (Pet. App. at A18-A19) on the grounds that it is unfair to apply the Miller standards to conduct occurring prior to the date of that decision. He declined to decide whether the films are in fact protected by the First Amendment, because "to speculate on our view of the films how the jury might have decided the case if it had been given the proper instructions would deny the right of trial by jury" (Pet. App. at A19).

SUMMARY OF ARGUMENT

I

The U.S. District Court's instructions to the jury on Miller standards were proper.

The "Memoirs" standard of "utterly without redeeming social value", which was applied by Justices Brennan, Warren and Fortas in the civil "Fanny Hill" case, was never intended by those justices to be applied in the same manner in criminal cases. See the two criminal cases, Ginzburg v. U.S. and Mishkin v. New York, decided on the same day. To apply the 3 tests independently in criminal cases would be at complete odds with the requirement of those justices that the 3 tests must "coalesce".

The "Memoirs" concept of "utterly without redeeming social value", as an independent criteria, has never gained the acceptance of more

than three Justices and cannot, therefore, under our rules of judicial interpretation, attain the rank of "controlling precedent". The opinions cited by the Solicitor General involve the doctrine of the law of the case, which is a rule of practice, not a principle of substantive law.

The Solicitor General's advocacy of a new "rule of the case" which, by "prevailing" for a number of years, can command the status of "controlling precedent", is fundamentally unsound in that it contradicts well-established rules of stare decisis, and presents a means of undermining the time-honored principle that we are a nation of laws and not of men.

The words used by the Miller Court, i.e., "do not adopt" and "reject", express the connotation that the "Memoirs" standard has never been accepted by this Court.

The Miller opinion does not acknowledge that "Memoirs" was "controlling" case law. The Miller opinion was addressing itself to the attempt in the State of California to codify and legislatively apply the civil standards in "Memoirs" to the criminal field. In that process, the California State Legislature failed to incorporate the important qualifying word, "coalesce", and further prevented a rational development of that test in criminal cases.

The opinions of the Circuit Courts of Appeal show that the individual panels of judges are not in agreement as to the manner in which the so-called "Roth-Memoirs" standards function in criminal cases. For that reason, a statistical count of the Circuit Courts which have given lip service to such standards is unimportant, because it does not prove anything.

This Court's opinion in Kois v. Wisconsin, decided on June 26, 1972, was public notice to everyone that the "Roth" standards were "controlling precedent" and that the "Roth-Memoirs" standards were not controlling precedent.

Marks was indicted before the Miller decision. When Marks moved to dismiss the indictment after the Miller decision, Judge Mac Swinford was required to apply Miller and its benefits. The best way to apply its benefits is to instruct the jury on "Miller" standards.

The language of Judge Mac Swinford's instructions to the jury, read as a whole, satisfied the requirements of both the "Miller" standards and the "Roth-Memoirs" standards.

This Court's opinion in Hamling v. U.S. held the "Miller" standards to be the equivalent of the so-called "Memoirs" standards. This Court has never held that it was reversible error to give one instruction in preference to an equivalent instruction.

Petitioners' "due process" claim of a vested right, premised upon "ex post facto" principles, to have the petit jury instructed on "Memoirs" standards is constructed on two faulty premises: (1) that the federal obscenity crime requires a specific criminal intent that the defendant knew the subject matter was obscene, and (2) that a personal mistake of law is a defense to a criminal obscenity prosecution. Neither proposition is available as a foundation for a due process claim based on "ex post facto" principles.

Petitioners' "due process" claim, based upon "ex post facto" principles is without support in that: (1) there has been no judicial expansion, since both the "Miller" and "Roth-Memoirs" standards forbid the same criminal acts, (2) the judicial construction adopted in Miller was clearly forseeable, and (3) the "Miller" standards accord the defendants the same defense as are accorded to them under "Roth-Memoirs" standards.

II

An appellate court is not required to examine the subject matter where the record is clear that a legitimate First Amendment claim has not been raised (i.e. that the films are hard-core pornography). The affidavits of Selby and Glossup clearly show the films to be hard-core pornography. That finding has not been shown to be in error.

It is intellectual nonsense to argue that, under the instant facts, the Court has not given sufficient attention to First Amendment values. See Hans Christian Anderson's "The Emperor's New Clothes" at Appendix "C" to this brief.

III

The jury was properly instructed to assess the materials in terms of the community standards of the judicial district from which the jury was selected and in which the trial was held. That concept of the "community" is the logical consequence of the declaration of national policy expressed by Congress in the Jury Selection and Service Act of 1968, 28 U.S.C.A. section 1861.

ARGUMENT

I

The U. S. District Court's Instructions To The Jury on Miller Standards Were Proper.
A. The "Memoirs" standard of "utterly without redeeming social value" was never intended to be applied independently in criminal cases.

The "Memoirs" standard of "utterly without redeeming social value," as applied by Justices Brennan, Warren, and Fortas in the Civil Injunction "Fanny Hill" case, A Book Named "John Cleland's Memoirs of a Woman of Pleasure", et al. v. Attorney General of the Commonwealth of Massachusetts, 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975, was never intended by those justices to be applied in that same fashion in criminal cases. See the opinions in which those justices joined in the criminal cases, Ginzburg v. U. S., 383 U. S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942 and Mishkin v. New York, 383 U.S. 502, 16 L.Ed.2d 56, 86 S. Ct. 958, decided on the same date as the Fanny Hill decision, and their requirement in Fanny Hill at page 5 that the "three elements must coalesce." See also the analysis on this point appearing in the National Decency Reporter of June-July 1966, a copy of which is attached as Appendix B to the Brief Amicus Curiae herein.

The requirement voiced in the opinion of Justices Brennan, Warren, and Fortas in "Memoirs" at page 6 that:

> "A book cannot be proscribed unless it is found to be utterly without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently . . . ." (Our emphasis.)

is not so startling when one considers that this Court in Fanny Hill was reviewing an injunctive-type decree rather than a criminal conviction.1/

It does not follow, however, that the criteria are applied independently in criminal cases, nor does it mean that where there is a proper finding in a criminal case that the dominant appeal is to prurient interest, the subject matter may still have redeeming social importance under the circumstances at issue. In a criminal case, a finding that the dominant theme--prurient interest test--has been met would necessarily be inconsistent with a finding of redeeming social importance.

1/ Justice Brennan drew attention to this distinction at Footnote 3 of his opinion in the Fanny Hill case. See also Footnote 15 of Justice Brennan's opinion in the Ginzburg case.

In the review of an injunction, the United States Supreme Court is confronted by a decree forbidding all distributions and encompassing a myriad of fact situations. In contrast, a criminal conviction embraces one given set of facts. The broad scope of the inquiry in an injunction situation requires that the test be applied independently, so that all factual situations are considered.

For example, assuming slight historical value, as hypothesized by the Massachusetts Supreme Court--what of the possible distribution to literateurs who might wish to study Fanny Hill for its historical significance in the development of the English novel, or the sociologists, who might have occasion to refer to it in their studies, or attorneys who might study it in connection with their efforts to arrest the spread of pornography?

The Massachusetts Statutes under consideration by the High Court, both criminal and civil, allowed no specific exemptions or defenses for situations which did not involve "pandering." Compare in this regard, the American Law Institute recommendations contained in Section 207.10 (4)(c) of the Model Penal Code (1957 draft) which provides:

> "The following shall not be criminal

offenses under this section . . .(c) Dissemination to institutions or individuals having scientific or other special justification for possessing such material . . . ."

Moreover, the Massachusetts statutory procedure authorized "collateral uses" of the injunctive decree, which further gave the impression of inhibiting legitimate use of the book. Footnote 4 of the opinion of Justices Brennan, Warren, and Fortas noted that Section 28H of the Massachusetts Injunctive Statute made a decree that a book was obscene "admissible in evidence" in a criminal prosecution under Section 28B and provided that "if prior to such offense a final decree had been entered against the book, the defendant, if the book be obscene . . . shall be 'conclusively presumed to have known' the book to be obscene." Justice Brennan's opinion noted at Footnote 5 that such "collateral uses of the declaration" would have a "serious inhibiting effect on the distribution (legitimate) of the book. . . ."

Under a strict interpretation of the Massachusetts Statutes, the distribution noted above (to literateurs, sociologists, etc.,) would have been barred by the Massachusetts decree.[2/] To draw

2/ The "conclusive presumption" position of the Massachusetts Injunctive Statute is criticized by the drafters of the Model Penal Code. See the reporter's comments in the 1957 draft at page 51.

in focus the constitutional issue underscored by the opinions of Justices Brennan, Warren, and Fortas, one need only to compare in contrast the results which should follow in the criminal forum, were the same factual situations to exist. Such distributions are not a violation of the obscenity laws. There is absent the pandering aspect. The predominant appeal of the material is not to prurient interest, but is rather to a legitimate social purpose which has social value. Accordingly, the Court would be required to rule that, as a matter of law, there was redeeming social importance and no jury question was presented.

In our view, the opinion of Justices Brennan, Warren, and Fortas would have been more precise had it expressed the obvious--that the theory of "independent" tests, relating as it does to variable obscenity concepts, has limited application to the injunctive-type proceeding and is not to be carried over and applied carte blanche in criminal areas. To be consistent, those three justices would have to agree that in a criminal case the "dominant theme--prurient appeal" test and "social value" test coincide ("coalesce"), so that in the criminal forum there is but one, and not several independent tests.

In criminal cases, it is at complete odds with the "variable" concept expressed by the

majority opinion in Mishkin and Ginzburg to say either that the "utterly without redeeming social value" phrase is an independent test, or that it is a necessary part of the definition of "obscene." If the dominant appeal of the material is aimed at prurient interest as defined in the Model Penal Code, then the conduct is in the area of criminal activity and the subject matter is utterly without redeeming social importance under the circumstances. In criminal cases, unlike the situation which exists in injunction cases, a specific set of facts are in issue and the two tests "coalesce." See Pierce v. Alabama, 296 So. 2d 218, 222 (May 9, 1974) cert. denied in Pierce v. Alabama, ___U.S.___, 42 L.Ed.2d 830, ___S.Ct. ___ (Jan. 20, 1975) where the Alabama Supreme Court said:

> "Thus any portion of McKinney I (Roth-Memoirs) in conflict with Miller are expressly overruled. Coalescence of the three-pronged Miller test must now be demonstrated before a conviction may be had in an obscenity case." (Our emphasis.)

In reviewing the book Housewife's Handbook on Selective Promiscuity, the majority in Ginzburg did not apply the social value test independently, but rather considered the dominant appeal of the material in the light of the precise

facts being reviewed (coalescence).[3]

B. The "Memoirs" concept of "utterly without redeeming social value" has never attained the rank of "controlling precedent."

The "Memoirs" concept of "utterly without redeeming social value" as an independent criteria, could not, under our system of jurisprudence, attain the rank of "controlling precedent." See U.S. v. Pink, 315 U.S. 203, 216; Cain v. Commonwealth of Kentucky, 437 S.W.2d 76 (Feb. 14, 1969); Florida v. Reese, 222 So.2d 732 (May 21, 1969); the concurring opinion of Justice Barnes of the Maryland Court of Appeal in Wagonheim v. Maryland State Board of Censors, 258 A.2d 240 at 247, 252 (Oct. 22, 1969); and the dissenting opinion of Associate Justice Musmanno in Commonwealth of Pennsylvania v. Robin, 421 Pa. 70, at 94-96, 218 A.2d 546 (Mar. 22, 1966) in which Justice Musmanno stated, at page 94:

> "Under our system of case law a decision becomes a precedent for controlling other cases when the opinion of the Court, accepted by a majority of the judges, announces a definite principle of law. If the decision commands no majority projection of law it is

3/In Ginzburg, the Court said at page 39:
". . .we cannot conclude that the court below erred in taking their own evaluation at its face value and declaring the book as a whole obscene despite the other evidence. . . ." (Our emphasis.)

rated as a 'no-clear majority' decision which is binding only for its journal result. All that the Gerstein case really decides is that the decision of the Supreme Court of Florida which banned 'Cancer' in Florida was reversed. Only speculation can guess as to what was really wrong with the Florida decision because, I repeat, there was no opinion filed by the Supreme Court. It, therefore, follows, if we have any rule of judicial interpretation in America, that Gerstein is no authority for what may or may not be done with 'Cancer' in Pennsylvania.

"Eugene Wambaugh, who was a Professor of Law at Harvard University, wrote in his book, The Study of Cases, that 'Even when all the judges concur in the result, the value of the case as an authority may be diminished and almost wholly destroyed by the fact that the reasons given by the several judges differ materially.'

"He cites in this connection the case of Dubuque v. Ill. R. R. Co., 39 Iowa 56, 80: 'There must be a concurrence of a majority of the judges upon the principles, rules of law, announced in the case, before they can be considered settled by a decision. If the court be equally divided or less than a

majority concur in a rule, no one will claim that it has the force of the authority of the court.'

"Henry Campbell Black, in his treatise on Law of Judicial Precedents, says: 'If all or a majority of the judges concur in the result . . . but differ as to the reasons which lead them to this conclusion, the case is not an authority except upon the general result.'"

The above analyses were, in substance, confirmed by this Court's opinion in Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 431, 438, 90 S.Ct. 207 (June 21, 1973) where this Court said at page 431:

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra, at 230, 33 L.Ed.2d 312, quoting Roth v. United States, supra, at 489, 1 L.Ed.2d 1498; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

We do not adopt as a constitutional standard the "utterly without redeeming social value" test of Memoirs v. Massachusetts, 383 U.S., at 419, 16 L.Ed.2d 1; that concept has never commanded the adherence of more than three Justices at one time.[7/]"

Footnote 7 to the statement of law in Miller reads:

"A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication. . . ." Kois v. Wisconsin, 408 U.S. 229, 231, 33 L.Ed.2d 312, 92 S.Ct. 2245 (1972). See Memoirs v. Mass., 383 U.S. 413, 461 16 L.Ed.2d 1, 86 S.Ct. 975 (1966) (White, J., dissenting). We also reject, as a constitutional standard, the ambiguous concept of "social importance." See id., at 462, 16 L.Ed.2d 1 (White, J., dissenting.)"

The recent individual opinions of members of this Court in Gregg v. Georgia, 428 U.S. ___, 49 L.Ed.2d 859, 96 S.Ct. ___(July 2, 1976), Roberts v. Louisiana, 428 U.S. ___, 49 L.Ed.2d 974, 96 S. Ct. ___(July 2, 1976), and Green v. Oklahoma, 428 U.S. ___, 49 L.Ed.2d 1214, 96 S.Ct. ___(July 6, 1976), cited by the Solicitor General, are inapposite on the question presented herein, which concerns "controlling precedent." The doctrine of the law of the case is a rule of practice and not a principle of substantive law,[4/] much less Constitutional law. It was never intended to

4/ 21 C.J.S. Courts § 195 at page 330. See also, Supreme Court No-Clear-Majority Decisions, A Study in Stare Decisis, 24 U. of Chi. L. Rev. (1956) at pages 99-156, for a discussion of this problem.

change the law regarding "controlling precedent," or permit a minority opinion of U. S. Supreme Court Justices to change the law in 50 states. See Musmanno, dissenting in Commonwealth of Pennsylvania v. Robin, supra, at pages 93-94.

C. The Solicitor General's Advocacy of a new "rule of the case" which, by "prevailing" for a number of years, can command the status of "controlling precedent" is fundamentally unsound.

The Solicitor General's advocacy (at page 29 of his Brief on the Merits) of a new principle of law--a "rule of the case" which, by "prevailing" for a number of years, can command the status of "controlling precedent" is fundamentally unsound in that it:

(1) contradicts well-established rules of stare decisis, and

(2) presents a means of undermining the time-honored principle that we are a nation of laws and not of men.

To apply the Solicitor General's Rule would permit men in positions of ultimate authority to make new law by refusing to follow the existing law. [5/]

5/ A classic example of this problem is present in the history of the struggle to control the growth of pornography during the 20-year period, 1956-1976. Justices Black and Douglas dogmatically

(This footnote is continued on the next page)

D. The Solicitor General's Claim of prior acceptance of the "Memoirs" standard as a "rule" is not supported by the language used by the Miller Court, which stated that it "rejected", (not discarded) that ambiguous concept.

The Solicitor General is in error when he argues, as support for his proposition that the Memoirs standard had prior acceptance as a "rule", that the Miller Court "discarded . . . the Memoirs standard" (see Brief for the United States at page 30). What this Court really said in refused to follow the law as laid down by the majority in 1957 in Roth-Alberts. As a result, the people's cause has been unjustly saddled with an infirmity which required them to win over 5 of the remaining 7 Justices every time a case is docketed with the Court. On the reasonableness of the Douglas view, the late Justice Harlan had the following comment to make in Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, at 705, 20 L.Ed.2d 225, 244, 88 S.Ct. 1298, 1314:

> "Two members of the Court steadfastly maintained that the First and Fourteenth Amendments render society powerless to protect itself against the dissemination of even the filthiest materials. No other member of the Court, past or present, has ever stated his acceptance of that point of view. . . ."

Because of this Court's failure to require those Justices to adhere to "controlling precedent", lewd films like "Deep Throat" are now commonplace in America and have been exported to the world at large--to our great shame, and to the discredit of our judicial system in America.

Miller v. California, supra, at page 431, was:

> "We do not adopt as a constitutional standard the 'utterly without redeeming social value' test of Memoirs v. Massachusetts. . . ." (our emphasis).

and at footnote 7 on page 431:

> ". . . We also reject, as a constitutional standard, the ambiguous concept of 'social importance'" (our emphasis).

The use of the word "adopt" expresses the connotation that a prior relationship had never existed. Webster's Collegiate Dictionary, Fifth Edition, defines the verb "adopt" as:

> "1. To take by choice into some relationship, such as that of heir, friend, citizen, etc; to take voluntarily (a child of other parents) as one's own child.
>
> 2. To take and apply or put into practice as one's own (what is not so naturally).
>
> 3. Parl. Practice. To accept, as a report, in acquittance of a duty imposed."

The verb "reject" which was used by the Miller Court at footnote 7 expresses an implication that the "Memoirs" concept had never ever been "used" by the Court. Webster's Collegiate Dictionary, Fifth Edition, explains the difference between the verb "discard", used by the Solicitor General, and "reject", as used by the Miller

Court as follows:

> "To discard is to put or throw aside or away, especially as useless or outworn; as, discarded clothing; to reject is more commonly to repel, or refuse to receive or to employ, something offered; as, to reject an offer."

E. The Miller opinion does not recognize that the constitutional test of obscenity had been changed. Miller did not review federal "Memoirs Standards" as such, but rather a California Statute which had attempted to codify and legislatively apply the ambiguous "Memoirs" concept.

The Solicitor General is in error when he states that this Court, in Miller, recognized that the constitutional test of obscenity had been changed.[6/] In Miller v. California this Court was not reviewing a case which involved the

6/ See Brief for the United States at page 30:
> "The Court has recognized that Miller changed the constitutional test of obscenity. In Miller itself the trial had taken place after Memoirs, and the jury had been charged under the Roth-Memoirs standards. The Court indicated that this was proper, because the Memoirs test was correctly regarded at the time of trial as limiting state prosecution under controlling case law (413 U.S. at 30-31). The Miller Court explicitly formulated new rules to alleviate the almost impossible burden of proof ..."

federal "Memoirs" standards as used by Justices Fortas, Brennan and Warren in the Fanny Hill, Ginzburg, and Mishkin cases, but instead, was reviewing a conviction based upon section 311(a) of the California Penal Code, a state statute which had attempted to codify and legislatively apply the civil standards in "Memoirs" to the criminal field.[7/] In the process, the California State Legislature failed to incorporate the important qualifying word "coalesce", and thereby further complicated a test which, as utilized in the civil injunction "Fanny Hill" case, involved a subtle distinction, and called for a clear understanding of a complex development in the law. See "Analysis of the Mishkin, Ginzburg and Fanny Hill Cases" at Appendix B to the Brief Amicus Curiae, annexed hereto. When this Court said in Miller at page 435:

> "This (Memoirs standard)...was correctly regarded at the trial as limiting state prosecution under the controlling case law."

it had reference to the fact that California,

7/ See Miller at page 430:
> "The case we now review was tried on the theory that the California Penal Code §311 approximately incorporates the three-stage Memoirs test, supra. But now the Memoirs test has been abandoned as unworkable by its author; and no Member of the Court today supports the Memoirs formulation."

not the United States Supreme Court, had adopted "Memoirs" as the rule of law for the State of California.[8/]

F. Statistics relating to the number of Circuit Courts which have given lip service to "Roth-Memoirs" standards are immaterial. The inherent ambiguity of "Roth-Memoirs" standards has prevented those same courts from being in agreement as to the manner in which they function in criminal cases.

The importance that the Solicitor General attaches to his statement at page 30:

> "Every court of appeals that considered the matter between Memoirs and Miller held, on similar reasoning, that the charge to the jury must be based on the Roth-Memoirs standards."

is not warranted. Those Courts were never in agreement as to the manner in which the "Roth-Memoirs" standards functioned in criminal cases, as applied to given subject manner.

8/See Miller at page 435:

> "As noted before, this case was tried on the theory that the California obscenity statute sought to incorporate the tripartite test of Memoirs. This, a 'national' standard of First Amendment protection enumerated by a plurality of this Court, was correctly regarded at the time of trial as limiting state prosecution under the controlling case law."

The "Fanny Hill" civil injunction opinion requires that "the three elements (of the Memoirs test) must coalesce." See Point I A, supra, at page 21 and the preceding Motion at page 6, footnote 4. The word "coalesce", which is defined in Webster's Collegiate Dictionary as "To grow together into one body" and "to combine into one body or community; as vapors or parties coalesce", precludes an overemphasis on the "utterly without redeeming social value" standard. Viewed in this light, the "Miller" standards are equivalent to the "Roth-Memoirs" standards, as this Court held in Hamling v. U.S., and do not represent a "marked shift in the scope of the material deemed to be obscene" or "expanded the field of potential criminal liability" or prevent the petitioners from knowing "the standard by which his conduct will be judged", as erroneously construed by the Court of Appeals in U.S. v. Wasserman, 504 F.2d 1012, 1015 (5th Cir., Dec. 9, 1974) and U.S. v. Jacobs, 513 F.2d 564, 566 (9th Cir., Sept. 25, 1974).

In those Circuit Courts (D.C., 1st, 5th and 9th) which are cited by the Solicitor General as support for his proposition that a jury charge in "Roth-Memoirs" standards was mandated under the trial facts herein, several appellate panels have reached that conclusion through a misunder-

standing as to the manner in which the "Roth-Memoirs" standards were meant to be applied. See the test used by the Court of Appeals, District of Columbia Circuit, in U.S. v. Sherpix, Inc., 512 F.2d 1361 (May 15, 1975) at page 1365 which omits a consideration of the word "coalesce" from the "Memoirs" definition. Compare, however, the result reached by the Court of Appeals in U.S. v. Hill, 500 F.2d 733, 737 (Sept. 11, 1974), where an entirely different view of the "Roth-Memoirs" standard was employed by that 5th Circuit panel. The Hill Court, in applying the "Roth-Memoirs" standard, found the trial court's instructions to the jury to be correct, even though that Court did not "mouth" the "Roth-Memoirs" standard, at page 737:

> "Although the Court did not use the words 'utterly without redeeming social value' as expressed in Memoirs, we do not deem it necessary that a jury instruction recite the precise words of judicial opinions in order to convey the ideas therein expressed. Defendant would have us hold that the law is revealed to the jury by some magical incantation of the exact words of a legal opinion, and anything short of that is reversible error. We think the above passage of the Court's charge, read

> with the instructions as a whole, was sufficient to inform the jury that they should not convict the defendant if they found the materials to be of any social value."

It is quite obvious that the District of Columbia Circuit panel sitting in U.S. v. Sherpix, supra, (MacKinnon, Moore and Robb) did not have the same view of the "Roth-Memoirs" standard as the 5th Circuit panel sitting in U.S. v. Hill, supra, (Roney, Moore, Ainsworth). In this regard, see the discussion of U.S. v. Hill, supra, which appears in U.S. v. Sherpix, 512 F.2d 1361 at 1366.

An analysis and comparison of the above opinions in Sherpix and Hill demonstrates that the "clear consensus of the courts that have considered the question" which the Solicitor General mistakenly relies upon (See Brief for the United States at page 17) is not so "clear" - at least as to the basic understanding of what the "Roth-Memoirs" standard requires.

G. That the "Roth" standard remained as "controlling precedent" was publicly announced by this Court's "clear majority decision" on June 26, 1972, in Kois v. Wisconsin.

If there was ever any doubt that the "Roth" standard was "controlling precedent" for the trial court below, that doubt was dispelled by this Court's clear majority decision in Kois

v. Wisconsin, 408 U.S. 229, 33 L.Ed.2d 312, 92 S. Ct. 2245 (June 26, 1972). The rejection of this proposition by the Solicitor General (Brief for the United States at page 32, footnote 16) does not mention the fact that 7 judges of a 15 judge en banc panel of the Court of Appeals (Fifth Circuit) in U.S. v. Groner, 479 F.2d 577 (May 22, 1973) were of the opinion that Kois did broadcast that legal principle. Except for the fact that the 8th judge, Circuit Judge Clark in the en banc hearing in U.S. v. Groner, supra, had some reservation on the significance of Kois v. Wisconsin (see his concurring opinion at page 588), such would have become controlling law in the 5th circuit, and would have turned the "consensus", relied upon by the Solicitor General, in the direction of a 3-3 split. See Point I F, supra, at pages 36-39.)

H. Because the federal indictments were returned before Miller was decided, this Court's decision in Hamling v. U.S. controls, and the trial judge was required to instruct the jury on Miller Standards.

To the extent that the grand jury indictments against the petitioners were filed on April 27, 1973, some two months before the decision in Miller v. California, the general principles expressed in Hamling v. U.S., at 611:

> "a general change in the law occurring after a relevant event in a case will be given effect while the case is on direct review."

and:

> "any constitutional principle enunciated in Miller which would serve to benefit petitioners must be applied in their case."

are arguably apposite. Assuming that the above propositions of law do apply and govern pre-trial motions after indictment, Judge Mac Swinford's decision on Oct. 5, 1973 to overrule the Petitioners' pre-trial motion to dismiss (App. A47-A52), and to instruct the jury on the "Miller" standards in the jury trial which was conducted immediately thereafter, fully complies with the principles expressed in Hamling. The surest way to "apply" any benefits which may arise out of "Miller" standards is by instructing the jury on "Miller" standards.

I. Judge Mac Swinford's instructions to the jury were sufficient under both the "Miller" standards and the "Roth-Memoirs" standards.

In U.S. v. Hill, 500 F.2d 733 (5th Cir., Sept. 11, 1974) cert. denied in Hill v. U.S., ___U.S.___ 43 L.Ed.2d 430, ___S.Ct.___ (Feb. 24, 1975), Circuit Judge Roney, speaking for the unanimous 5th Circuit panel, held as follows,

as to the instructions therein given by the trial judge, at page 737:

> "Assuming without deciding that something other than the varying semantics of different words to articulate the same idea is involved in the Miller decision and that it does articulate a standard different than Roth by which a jury could reach different conclusions on the material involved in this case, an examination on the charge to the jury reveals that the defendant was given the benefit of both standards. Although the Court first instructed the jury that the test of whether the material was obscene depended on the existence of the three elements of the Miller standard, it then went on to satisfactorily, we think, instruct the jury as to the social value element found in Roth-Memoirs. The Court said:
>
> > 'Freedom of expression is fundamental to our society and has contributed much to the development and well-being of our free society. In the exercise of the constitutional right to free expression which all of us enjoy, sex may be portrayed and the subject of sex may be discussed, freely

> > and publicly, so long as the expression does not fall within the area of obscenity. However, the constitutional right to free expression does not extend to the expression of that which is obscene.
> >
> > Furthermore, obscenity is excluded from constitutional protection because it is without social value. Of course, the mere fact that material deals with sex does not mean that it cannot have value to society. Indeed, such material can have social importance if it portrays sex in a manner that advocates ideas or that has literary, scientific or artistic value. It is for you to determine whether the materials at issue in this case are of value to society.'
>
> Although the Court did not use the words 'utterly without redeeming social value' as expressed in Memoirs, we do not deem it necessary that a jury instruction recite the precise words of judicial opinions in order to convey the ideas therein expressed. Defendant would have us hold that the law is revealed to the jury by some magical incantation of the exact words

of a legal opinion, and anything short of that is reversible error. We think the above passage of the Court's charge, read with the instructions as a whole, was sufficient to inform the jury that they should not convict the defendant if they found the materials to be of any social value.

The precise effect of the Court's instructions to the jury in the instant case was to secure for the defendant the same protection at trial as to the facts which a Thevis review by this Court affords him on appeal as a constitutional matter. By charging the jury under both the Miller and the Roth-Memoirs tests of obscenity, the District Court gave the defendant the benefit of both standards." (Our emphasis).

That portion of Judge Mac Swinford's instruction which is reproduced at page 14 of this brief (see App. A89 at first full paragraph) beginning with the sentence "Obscenity is excluded from constitutional protection because it is without serious social importance" is, word for word, the same as the second of the two paragraphs of the trial court instruction in Hill, which was relied upon by the Fifth Circuit, as support for its affirmance.

J. This Court's holding in Roth-Alberts that it was not error to give an equivalent instruction for the definition of "obscene" mandates a determination that Judge Mac Swinford's instructions were proper.

The majority opinion in Roth-Alberts, 354 U.S. 476, 1 L.Ed.2d 1498, 76 S.Ct. 1314 (June 24, 1957) approved four definitions for the word "obscene" as being substantial equivalents. At page 486, the federal court sponsored test in Roth and the state court sponsored test in Alberts were set forth:

> "In Roth, the trial judge instructed the jury: 'The words obscene, lewd and lascivious as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts.' (Emphasis added.) In Alberts, the trial judge applied the test laid down in People v. Wepplo, 78 Cal.App.2d Supp. 959, 178 P.2d 853, namely, whether the material has 'a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires.'"

The court thereafter held both tests to be within the constitutional standard, when given with proper jury instructions relevant to the dominant

theme and proper audience.

At page 489, Justice Brennan gave tacid approval to a third definition in these words:

> "Some American courts adopted this standard but later decisions have rejected it and substituted this test: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press..."

At page 487, footnote 20, the majority opinion gave approval to the definition found in the A.L.I. Model Penal Code, Section 207.10(2) (Tentative Draft 1957) and noted no significant difference between this and the meaning of obscenity developed in the case law:

> "...A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or

> representation of such matters.... See Comment, id., at 10, and the discussion at page 29 et seq."

Nowhere, either in the judgment entered in Roth v. U.S. or in Alberts v. California, or in any case subsequent thereto, has this Court ever held that it was reversible error to give one instruction in preference to an equivalent instruction. See Hamling v. U.S., supra, at pp. 617-619. Accordingly, Trial Judge Mac Swinford's instruction to the jury on the "Miller" standard, which in Hamling v. U.S., supra, at page 620 was held to be equivalent to the so-called "Memoirs" standards, was entirely proper. See also U.S. v. Hill, supra, at Point 1-I, at page 41, supra.

K. Petitioners' "due process" claim of a vested right, premised upon "ex post facto" principles, to have the petit jury instructed on "Memoirs" standards, is constructed on faulty premises.

Petitioners' "due process" claim of a vested right to have the petit jury instructed on "Memoirs" standards is devoid of merit, having been constructed upon two faulty premises; namely, (1) that the federal obscenity crime requires a specific criminal intent that the defendant knew the subject matter was obscene, and (2) that an erroneous personal mistake of law is a defense

to a federal obscenity charge. Neither proposition is available as support for their claim. Under Rosen v. U.S., 161 U.S. 29, 40 L.Ed. 606, 16 S. Ct. 434 (1896) and Hamling v. U.S., 418 U.S. 87, 41 L.Ed.2d 590, 622, 94 S.Ct. 2887 (June 24, 1976) the federal obscenity statute required only a general criminal intent. Further, the petitioners' personal belief is irrelevant, Schindler v. U.S., 208 F.2d 289, 290 (9th Cir. 1953) cert. denied in Schindler v. U.S., 347 U.S. 938, 98 L.Ed. 1088, 74 S.Ct. 633 (1954); Miller v. U.S., 431 F.2d 655, 659 (Sept. 16, 1970), vacated and remanded in Miller v. U.S., 413 U.S. 913, 37 L. Ed.2d 1022, 93 S.Ct. 3030 (June 25, 1973), reaffirmed and original opinion adopted, in Miller v. U.S., 507 F.2d 1100 (Nov. 29, 1974), cert. denied in Miller v. U.S., 422 U.S. 1025, 45 L.Ed. 2d 683, 95 S.Ct. 2620 (June 16, 1975).

Although the above argument was considered and rejected in U.S. v. Jacobs, 513 F.2d 564, 566 at footnote 2 (9th Cir., Sept. 25, 1974), the rationale of that Court is not sound. In the first place, the Court failed to recognize that Jacobs had previously been put on notice in Kois v. Wisconsin, supra, that he had no right to rely upon "Memoirs" standards. (See Point I G, at page 39, supra).

Further, in rejecting the above argument,

the Jacobs Court supported its conclusion with the following rationale:

> "The argument is spurious. The pre-Miller definition of obscenity involved a somewhat vague (although not so obscure as to violate due process) series of value judgments, left to the jury for final determination. The Miller definition embodies a different series of value judgments, which at least in the third prong gives the jury a broader task, hence making the statute's proscriptions more uncertain (although again not so vague as to violate due process, see Hamling, supra, at 110-116, 94 S.Ct. at 2904-2907, 41 L.Ed.2d at 616-620)..."

Notwithstanding the fact that the Jacobs Court recognized that the premise upon which they grounded their conclusion did not constitute a due process violation under this Court's recent decisions (see above "although not so obscure as to violate due process" and "although again not so vague as to violate due process..."), that Court, nevertheless, was able to construct upon those same faulty foundations, a "due process" right of an individual "to take his best guess as to what the jury may ultimately (factually) decide." Amicus submits that the "best guess" right of an individual in those circum-

stances is no broader than that noted by this Court in Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, at page 433, footnote 10, and in Nash v. U.S., 229 U.S. 373 (57 L.Ed.2d 1232, 33 S.Ct. 780), cited at footnote 10. The Jacobs rationale flies in the face of Rosen, supra, and Nash, supra. Rosen was, in short, a public policy statement that when one deliberately enters the distribution field of material of a sexually descriptive nature, he takes the risk of offending current community standards and must be held accountable if he does. If it be thought that this puts too great a burden of prescience on defendants, the answer is, in the words of Mr. Justice Holmes, in Nash v. U.S., 229 U.S. 373, 377, cited in Tyomies Publishing Co. v. U.S., 211 Fed. 385:

> "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here, he may incur the penalty of death...."

L.	Petitioner has failed to state a valid "due process" claim based upon "ex post facto" principles.

Assuming the law to be as suggested by the

Solicitor General that the Due Process Clause absorbs ex post facto principles and/or applies precisely the same limitations to judicial construction, still the due process claim must fail for failure to state a case within the perimeters of Bouie v. Columbia, 378 U.S. 347, 12 L.Ed.2d, 894, 84 S.Ct. 1697 (June 22, 1964).

As was stated by the Solicitor General (Brief for the United States, at pages 18 and 19), the understanding of the meaning of the Ex Post Facto Clause has not changed significantly since Mr. Justice Chase announced for a unanimous Court in Calder v. Bull, 3 Dall. 385, 390, that a law is an ex post facto law if it makes criminal, acts which were not forbidden when they occurred; if it increases the punishment for criminal acts; or if it "alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." Also, a law is an ex post facto law if "in (its) relation to the offense, or its consequences (it) alters the situation of a party to his disadvantage" or "takes away or impairs the defense which the law has provided the defendant" at the time of the offense. Kring v. Missouri, 107 U.S. 221, 228-229 (quoting from United States v. Hall, 26 Fed. Cas. 84, 86-87 (No.

15,285)).

Amicus submits that the Solicitor General is in error in concluding that the action taken by the trial court breached the above "ex post facto" principles, for the following reasons:

1. There has been no judicial expansion. The "Memoirs" standards, properly construed, and the "Miller" standards forbid the same criminal acts. See Points I A through I J, at pages 21-47, supra.
2. The judicial construction adopted by the majority in "Miller" was forseeable and a reasonable person would not have been caught unawares. See Point I A through I J, at pages 21-47, supra. Note, in particular Point I G, at pages 39-40. See also Bradley v. Richmond School Board, 416 U.S. 696, 40 L.Ed.2d 476, 94 S.Ct. 2006 (May 15, 1974) at 493, where this Court held:

"From the outset, upon the filing of the original complaint in 1961, the Board engaged in a conscious course of conduct with the knowledge that, under different theories, discussed by the District Court and the Court of Appeals, the Board could have been required to pay attorneys' fees. Even assuming a

degree of uncertainty in the law at that time regarding the Board's constitutional obligations, there is no indication that the obligation under §718, if known, rather than simply the common-law availability of an award, would have caused the Board to order its conduct so as to render this litigation unnecessary and thereby preclude the incurring of such costs.

3. The "Miller" standards did not "take away or impair the defense which the law has provided the defendant." That defense which was formerly available under the previous constitutional standards is still available under "Miller" standards.

The Solicitor General's claim (Brief for the United States at page 19) that the Government's burden of proof has been "eased" by Miller v. California is groundless. In a case such as this, where obscenity per se is at issue, the proof is established by the subject matter itself, and the government's burden of proof has never been greater than that of offering the subject matter in evidence. That burden has not been "eased" by "Miller". That the government's case-in-chief herein presented fully met their burden of proof

is clear beyond doubt, and the correctness of that proposition of law does not depend upon any subsequent rule of law laid down in Miller, supra. See Paris Adult Theater I v. Slayton, 413 U.S. at 56, 37 L.Ed.2d at 456, 93 S.Ct. at 2634, Kaplan v. California, 413 U.S. at 120, 37 L.Ed.2d at 488, 93 S.Ct. at 2684 and U.S. v. Thevis, 484 F.2d 1149 at 1153.

II

An Appellate Court Is Not Required To Examine The Subject Matter Where The Record Is Clear That A Legitimate First Amendment Issue Has Not Been Raised (i.e. That The Films Which Were Exhibited To The Jury Are Obscene Per Se).

Amicus Curiae disagrees with the position taken by the Solicitor General on Question 2, which is phrased in the Petition for a Writ of Certiorari as:

> "2. Whether an appellate court, in performing its duty enunciated in Jacobellis v. Ohio, 378 U.S. 184 (1964), of independently determining the issue of obscenity, must itself view the materials charged as obscene?"

and contends that the Court of Appeals was correct in its findings that the record, described hereinafter, is sufficient, and that there was no need for the Court to examine the films:

(1) Affidavit of Special Agent Ronald F. Selby setting forth the contents of the film "Swing High" and previews of "Doctor's Disciples". (See Statement of Facts" at page 6, supra, and App. at pages 11-13).

(2) Affidavit of Special Agent Vernon R. Glossup, setting forth the contents of the film "Deep Throat" and the previews "Teenage Cowgirls", "Black on White", "A Few Bucks More", and "Memoirs of a Madam". (See "Statement of Facts" at pages 5 and 6, supra, and App. at pages 16-26);

(3) The Court of Appeals' description of the films in its opinion. (See "Statement of Facts" at pages 16 and 17, supra, and Pet. App. A3, fn 1);

(4) The opinion of the Court of Appeals, holding:

"These affidavits clearly indicated that the films involved hard-core pornography of the worst sort", (See "Statement of Facts" at page 18 and Pet. App. at A5):

"There can be no question but that

the material in 'Deep Throat' was hard-core pornography. (See "Statement of Facts" at page 18, and Pet. App. at A14); and "Our examination of the record in the present appeals convinces us that such a probability does not exist here, for it is clear that under either Roth-Memoirs or Miller standards the material was obscene. . ." (See "Statement of Facts" at page 19, and Pet. App. at A15).

Amicus submits that it is intellectual nonsense to suggest that, given the record herein, the Court of Appeals' position "reflected insufficient attention to the First Amendment values involved." (Brief for the United States at page 35 footnote 20). Its finding that the films were "the type referred to by Mr. Justice Stewart in Jacobellis v. Ohio . . . when he stated we 'know it when (we) see it'" symbolizes the common sense judgment immortalized by Hans Christian Anderson in his fable "The Emperor's New Clothes".9/

9/See a reproduction of "The Emperor's New Clothes", printed in Denmark by Fyens Stiftsbogtrykkeri, Odense at Appendix "C". While a "fairy tale" is not a common reference in legal briefs, more and more Courts are seeing the need to rely upon this classic. See Ohio ex rel. Ewing v. "Without A Stitch, 276 N.E.2d 655, 658 (July 9, 1971). It has been well observed that a First Amendment question is not raised, nor a First Amendment value involved, every time that a piece of toilet paper is offered for viewing in the Courtroom.

III

The Jury Was Properly Instructed To Assess The Materials In Terms of The Community Standards Of The Judicial District From Which The Jury Was Selected And In Which The Trial Was Held.

Amicus Curiae agrees with the Solicitor General's position on Question 3 that the jury was properly instructed to apply the contemporary community standards of the judicial district in which the trial took place. The most logical reason for applying that rule is the rationale applied by seven justices of the Court of Appeals, Fifth Circuit, sitting en banc in U.S. v. Groner, 479 F.2d 577 (May 22, 1973) at page 583:

> "Our concept of the community is suggested by the declaration of our national policy in the Jury Selection and Service Act of 1968, 28 U.S.C.A. section 1861 (Sup. 1972) from which we quote:
>
> > 'It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district

or division wherein the court convenes.'"
(Emphasis theirs.)

Further, as stated by this Court in Hamling v. U.S., 418 U.S. 87, 107, 41 L.Ed.2d 590, 614, 94 S.Ct. 2887:

> "a principal concern in requiring that a judgment be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group..."

Judge Mac Swinford's jury instruction on the "average person" and comprehensive general instructions on the "contemporary community standards", repeated herein at pages 10 through 14, supra, (App. 85, 88, 94) amply complied with that requirement.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

DATED: September 17, 1976

Respectfully submitted,

Charles H. Keating, Jr.
919 Provident Tower
Cincinnati, Ohio

James J. Clancy
9055 La Tuna Canyon Road
Sun Valley, California

Counsel for Citizens for
Decency Through Law, Inc.

CERTIFICATE OF SERVICE

I, hereby certify that on this 18th day of September, 1976, copies of the within Motion of Citizens for Decency Through Law, Inc., For Leave To File a Brief as Amicus Curiae in Support of the Respondent United States of America; and Brief Amicus Curiae of Citizens for Decency Through Law, Inc., an Ohio Corporation, in Support of Respondent United States of America were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

Mr. Robert Eugene Smith, Esquire
2005 One Hundred Colony Square
Atlanta, Georgia 30361 (3 copies)

Mr. Robert H. Bork
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530 (3 copies)

James J. Clancy
9055 La Tuna Canyon Road
Sun Valley, California.

Counsel for Citizens for
Decency Through Law, Inc.

APPENDIX A

VARIETY news articles, reporting on the action (Concession) of the Solicitor General in his Brief for the United States, filed on or about July 9, 1976.

Reference: See Motion for Leave To File Brief Amicus Curiae at page 4, footnote 3.

Washington Likened To Corrupt French Court By Memphis U.S. Atty.

By MATTY BRESCIA

Memphis, July 13 — Understandably, the Dept. of Justice's charitable view toward "Deep Throat" expressed in this week's Supreme Court filings does not sit well with the federal prosecutors who convicted its producers, cast and distributors in April.

Openly challenging the Solicitor General's viewpoint, U.S. attorney Thomas F. Turley likened Washington to the royal court described by Voltaire: "Remote, corrupt, unteachable and unconcerned." Turley added it is "unusual for me to criticize my superior in Washington so colorfully, but that's the way I feel."

Apprised of Turley's comment, a department spokesman in Washington exclaimed, "My God, Turley didn't say that. Oh, Lord," adding, "No, I won't give you my name. Please don't quote me — I don't want anyone to know that I know about this or talked to anyone in Memphis."

Turley and fellow prosecutor Larry Parrish apparently fear their controversial conviction of "Throat" could be undone by the pleading of Solicitor General Robert Bork in an unrelated case involving an exhibitor of the pic in Newport, Ky. Bork argued the exhib was entitled to a new trial to acknowledge that stiffer Supreme Court obscenity standards were not in effect when "Throat" was first made.

Prosecutors here fear Bork has "confessed the error" of their recent victory and that conviction, plus other Memphis cases involving "School Girl" and other films, "could be washed out."

Porno Defense Lawyers Joyous, Some Rap Angry Prosecutor Turley

Memphis, July 20.

Consternation of U.S. Attorney Thomas F. Turley Jr. and apparently most of his colleagues in the Federal prosecution office here upon learning recently that Solicitor General Robert Bork of the Dept. of Justice in Washington had "undone" the convictions victory against "Deep Throat" and opened the way to new trials was reported last issue.

Since then the various defense attorneys have sounded off against Turley for his "intemperate" language in comment upon Bork. Plainly the pro-porno forces are delighted by Bork's action and consequently disapproving of the Memphis prosecutor "rage." Latter sees months of work and perhaps $4,000,000 in prosecutional costs lost and the possibility of a great victory for the pornographers' interest.

Philip Edward Kuhn, who defended Anthony Battista, a Philadelphia film distributor in the "Deep Throat" obscenity trial, chided Turley for chiding his (Turley's) superior in Washington.

Kuhn argues that all the defenders of the fellatio film's accused corporations and persons had asked the Memphis trial judge to explicate the earlier and later Millar case criteria in definition of screen obscenity—which is the very point since raised in a related trial in Kentucky involving a theatre operator who was also found guilty as to "Deep Throat."

James Umstead Jr. who defended Gordon Craddock of Atlanta's Craddock Films Inc. in an earlier Memphis case involving "School Girl" also sounded off. Craddock had been tried under a more stringent Federal concept of obscenity.

Philip D. Vitello who defended Louis Peraino, president of Bryanston Films of Manhattan for handling "Deep Throat" expressed gratification at the action of the solicitor-general but made no allusion to Turley's rage.

Bruce Kramer, defense lawyer for the actor Harry Reems and an official of the Tennessee unit of the American Civil Liberties Union was equally delighted and thought the Memphis judge ought forthwith to order a new trial in the recent "Deep Throat" convictions. Reems faces separate prosecution here involving another pornopic; "The Devil In Miss Jones."

Delay 'Deep Throat' Sentences

Federal Judge Angry At Bork As 'Throwing In The Sponge'

By MATTY BRESCIA

Memphis, July 27.

Defense barristers in the elongated "Deep Throat" trial here scored additional points for their clients in "winning" a postponement in the skedded sentencing of the 13 defendants and three corporations.

At the same time, U.S. Dist. Judge Harry Wellford, who ordered the delay in meting out the jail terms, unleashed a furious blast in open Federal Court, taking U.S. Solicitor-General Robert Bork over the hurdles when he bluntly stated: "the U.S. Solicitor-General (Bork) is just throwing in the sponge in this ('Throat') case."

Wellford consented to chief defense atty. Philip Daniel Vitello's motion "to delay sentencing my clients (Louis Peraino and Bryanston Films) in this matter as well as other defendants in the case."

The sentencing date had been Aug. 6, but the Federal jurist stated that "We (the court) will wait at least 30 days in order to consider post-trial briefs in light of Bork's filing of his brief." Judge Wellford, who previously "denied" the battery of defense counselors motions for a new trial — then further stated: "The status of that (new trial) ruling is now in limbo and we will await the Solicitor-Generals filing of his decision."

Judge Wellford, who presided over more than nine weeks of testimony in the "Deep Throat" matter, admitted that "I was shaken considerably last week when our Solicitor Gen. confessed an error in the government's prosecution of the Kentucky "Deep Throat' Federal trial. This is most unfortunate and most regrettable in the waste of time, money, and effort in this case," Judge Wellford spoke in a firm voice in a visibly uneasy atmosphere.

Reems Fund Drive

Aug. 6 has been set as the date for the sentencing of Harry Reems in Memphis after his conviction in the "Deep Throat" case. The Memphis court has denied all motions for a new trial effectively ignoring Solicitor-General Robert Bork of U.S. Dept. of Justice who urged the U.S. Supreme Court to apply other obscenity definitions in another, but similar "Deep Throat" conviction, in Kentucky.

"What we have now is a runaway prosecutor in a runaway courtroom," Reems told *Variety* last week.

Though Reems had hoped that the Memphis sentencing would be delayed pending the U.S. Supreme Court decision in the Kentucky theatreman matter, the Memphis decision means he must now proceed with his appeal immediately after the sentencing. Should the case eventually be sent back to Memphis because of a Supreme Court rethink on what obscenity definitions prevailed, it will mean added appeal costs for the porno actor.

A Reems fund-raiser was held in Chicago last week (22) and contributed approximately $2,000 to his defense fund. Similar events are now in the works for Philadelphia and Washington, D.C. On Aug. 28, Reems will address the First Amendment Lawyers Assn. in San Diego.

APPENDIX B

An Analysis of the Ginzburg, Mishkin and Fanny Hill Decisions, decided on March 21, 1966, appearing in the National Decency Reporter of June-July 1966.

References:

Motion of Citizens for Decency Through Law, Inc. at page 6, footnote 4.

Brief Amicus Curiae at pages 1 and 35.

AN ANALYSIS OF THE GINZBURG, MISHKIN and FANNY HILL DECISIONS

On March 21, 1966, the U. S. Supreme Court handed down its decisions in three important obscenity cases: *Edward Mishkin* v. *State of New York*, —— U.S. ——, 16L. Ed 2d 56, 86 Ct. ——; *Ralph Ginzburg et al.* v. *U. S.*, —— U. S. ——, 16 L. Ed 2d 31, 86 S. Ct. ——, and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" et al.* v. *Attorney General of the Commonwealth of Massachusetts*, —— U. S. ——, 16 L. Ed 2d 1, 86 S. Ct. ——. These decisions are herein referred to as the *Mishkin*. *Ginzburg* and *Fanny Hill* cases.

The final results were a major defeat to the smut industry.[1]

In *Mishkin* and *Ginzburg*, substantial jail sentences[2] had been meted out in state and federal courts to defendants, Edward Mishkin and Ralph Ginzburg, after successful criminal prosecutions under state and federal obscenity statutes. Both convictions were affirmed by the U. S. Supreme Court, with the majority opinions voicing a strong denunciation of the "sordid business of pandering — 'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.' "[3]

---

[1] *The Wall Street Journal* of March 22, 1966, reported: "The decisions may encourage a nationwide crackdown by local officials on sexy publications and movies. They represented a defeat for civil liberties advocates." *The New York Times* of March 24, 1966, quoted defense counsel Ephraim London of New York as saying: "This is the opening the district attorneys have been looking for." A spokesman for the Los Angeles District Attorney's office commented, as reported in the *Los Angeles Herald Examiner*: "After careful analysis of the Court's 31 page brief, I have concluded that we can successfully prosecute more of the girlie and nudist magazines than ever before."

[2] Edward Mishkin received a jail sentence of three years, to be spent in the New York City penitentiary. Ralph Ginzburg received a jail sentence of five years, to be served in the Federal penitentiary.

[3] *Ginzburg*, at page 36, citing Justice Warren's concurring opinion in *Roth-Alberts*.

In the *Fanny Hill* case, the attorney general had been successful in the state court in enjoining the sale of *Fanny Hill* in Massachusetts. The Massachusetts judgment was reversed by the U. S. Supreme Court on technical grounds and was sent back to the state court for further proceedings.

The *Mishkin* and *Ginzburg* decisions were clear majority decisions, with a majority of the members of the court joining in the majority opinion and its reasoning. On the other hand, the *Fanny Hill* case was a no-clear-majority decision with no more than three justices agreeing with the reasoning in any one opinion. There was no majority opinion in *Fanny Hill*, nor may any one of the separate opinions be cited as the opinion of the court. For a proper analysis on this latter point, see Justice Musmanno dissenting in *Commonwealth* v. *Robin, (Tropic of Cancer)*, —— Pa. ——, 218 A. 2d 546 (March 22, 1966), reported in *The National Decency Reporter* for May 1966, Vol. 3, No. 5 at Page 5, and Justice Clark's dissenting opinion in *Fanny Hill* at page 18.

Contrary to the erroneous reporting of certain news media, the reversal decided *nothing* as to the merits or demerits of *Fanny Hill* for the six members of the High Court who voted for reversal did so for different reasons. Justices Brennan, Warren and Fortas, in voting for reversal, took note of the "prior restraint" effects of the Massachusetts injunctive statute, with its unusual "conclusive presumption" provision,[4] and held that the Massachusetts Supreme Judicial Court erred in its interpretation of the *Roth* standard. They said nothing about the "findings of the Massachusetts Judicial Court which they had no occasion to assess." See *Fanny Hill, supra*, at p. 6. Their concern was with (1) the Massachusetts court's interpretation of *Roth-Alberts*, namely, that a book found to have some minimal literary value and one which could be said to play a part in the history of the development of the English novel could be barred *as to all, including those who would use the same for its legitimate values*, and (2) the fact that a judgment of "obscene" under the injunctive device would be conclusive in later criminal pro-

[4] This "conclusive presumption" provision is criticized by the drafters of the Model Penal Code. See Reporter's comments to 1957 draft at page 51.

ceedings against individuals who would distribute such matter for its legitimate values. Justices Black and Douglas voted for reversal on the grounds that they did not believe in the obscenity statutes. Justice Stewart voted for reversal on the grounds that *Fanny Hill* was not "hard-core pornography."

CDL attorneys view the majority opinions in *Mishkin* and *Ginzburg* as a reaffirmation of common law principles and the views espoused by Justice Learned Hand. The three decisions stand as the most important obscenity rulings in this nation's history.[5] Acting as precipitants, they have erased the doubts which clouded what many have regarded as muddied waters. See the opinion of Circuit Judge Moore in *U. S.* v. *Klaw, et al.*, 350 F. 2, 155 at 165 (July 15, 1965).

Highlighting the opinions was the agreement of a majority of the court:[6]

(1) (a) To accept the "variable" approach to obscenity as being within constitutional standards[7] and (b) in their review of convictions involving the Federal Postal Statute, to follow pre-*Roth* federal de-

[5] *The Cleveland Plain Dealer* of March 28, 1966, reported Charles Keating, Chairman of CDL, as saying: "The Supreme Court decisions of March 21 make it a different ballgame. . . . Any area that decides to rid itself of obscenity can do so by competent enforcement and vigorous prosecution. There is no excuse for pornographers to be in business after the court's decision."

[6] In its previous decision treating obscenity *vel non*, in *Jacobellis v. Ohio*, decided June 22, 1964, the United States Supreme Court did not file an Opinion of the Court inasmuch as the justices could not agree upon the reasoning for the reversal. None of the written opinions of the several justices in that case carried the force of an "Opinion of the Court." See Justice Michael Musmanno, dissenting in *Commonwealth v. Robin* (Tropic of Cancer), —— Pa. ——, 218 A. 2d 546, March 22, 1966, reported in *The National Decency Reporter* for May, 1966, Vol. 3, No. 5, at page 5. In the *Mishkin* and *Ginzburg* cases, however, the Court did file a majority opinion. There is no doubt whatsoever that what the majority opinion says in the latter cases is the law.

[7] See *Mishkin*, at page 62: "We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient groups; . . ."

cisions which had applied one aspect of the variable concept (pandering).[8]

(2) That the so-called "hard-core pornography" test is no part of the *Roth-Alberts* standard, the latter being less restrictive than the former.[9]

(3) That constitutional requirements for scienter do not require proof of "subjective knowledge." Because the court interpreted the New York statute to require proof equivalent to "knowingly or recklessly," it found it unnecessarry to define "what sort of mental element is required to a constitutionally permissible prosecution," i.e. whether "honest mistake" need be made a defense.

(4) To continue its previous adherence to the American Law Institute Model Penal Code concepts.[10]

[8] See *Ginzburg*, at pages 36, 38, and 39:

At p. 36: "Besides testimony as to the merit of the material, there was abundant evidence to show that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering—'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.'"

At p. 38: "And the circumstances of presentation and dissemination of material are equally relevant to determine *whether social importance claimed* for material in the court room was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the market place, or a spurious claim for litigation purposes."

At p. 39: "The decision in *Rebhuhn v. U. S.*, 109 F. 2d 512, is persuasive authority for our conclusion."

[9] See *Mishkin*, at pages 60 and 61:

At p. 60: "Indeed, the definition of 'obscene' adopted by the New York courts in interpreting Section 1141 limits a narrower class of conduct than that delimited under the *Roth* definition, *People v. Richmond County News, Inc.* . . ."

At p. 61: "The New York courts have interpreted 'obscenity' in Section 1141 to cover only so-called 'hard-core pornography,' see *People v. Richmond County News, Inc.*, 9 N. Y. 2d 578, 586, 587, 175 N.E. 2d 681-685, 686 (1961), quoted in Note 4, supra. Since that definition of 'obscenity' is more stringent than the *Roth* definition, the judgment that the constitutional criteria are satisified is implicit in the application of Section 1141 below."

[10] The majority opinions in *Ginzburg* and *Mishkin* cited the American Law Institute, Model Penal Code four times with approval. See *Mishkin* at page 63, fn 9 (scienter) and *Ginzburg* at page 38, fn 12; at page 39, fn 14; and page 40, fn 19 (pandering).

(5) That relevant evidence on the issue of scienter in "publishing" cases includes:[11] (a) the publisher's instruction to his artists and writers; (b) any efforts of the defendant to disguise his role in the enterprise; (c) titles, covers and illustrations which demonstrate the transparency of the character of the material; (d) the number of obscene books published and possessed for sale; (e) the repetitive quality of the sequences and formats of the books; (f) exorbitant prices marked on the books.

(6) That relevant evidence on the issue of obscenity includes:[12] (a) evidence showing that the material in question was sold as stock in trade of a business purveying textual or graphical matter openly advertised to appeal to the erotic interest of its customers; (b) advertising which gives an indication of the "leer of the sensualist;" (c) the manner of solicitation. If the nature of the material is such that it has "social redeeming importance" to a limited audience, such as psychiatrists, physicians, psychologists, etc., was the solicitation or distribution directed to the proper audience or was it indiscriminate?

(7) That whether material has "redeeming social importance" depends upon the circumstances of its presentation and dissemination.[13] The social importance claimed must be the basis upon which it is traded in the market place and may not be a spurious claim for litigation purposes.

Equally as important as the agreement noted above, was the disagreement noted among the members which constituted the majority in *Mishkin* and *Ginzburg*, when the case under review was an injunction, rather than a criminal prosecution. Once again the hazards of the injunctive or "in rem" procedure were underscored.[14]

[11] See *Mishkin*, at page 63.

[12] See *Ginzburg*, at page 36, 37, 39.

[13] See *Ginzburg*, at page 38.

[14] In a special edition of *The National Decency Reporter*, reporting on a June 22, 1964 decision, CDL made the following comment: "To entertain an opinion that the injunctive device is a useful tool in the war against obscenity is unrealistic. An examination of *Kingsley Book, Inc. v. Brown*, 354 U. S. 436 (1957) and the majority opinion in *A Quantity of Copies of Books v. Kansas* bears this out." CDL has stressed the importance of the criminal forum. See NDR, Vol. 2, No. 6 (Feb. 1965) at page 2; Vol. 2, No. 12 (Sept. 1965) at page 7. The attorney general of Massachusetts entertains a different view. In a letter to all district attorneys and city

The failure to agree upon an "Opinion of the Court" in the *Fanny Hill* case did not, however, detract from the impact of the majority opinions in the *Mishkin* and *Ginzburg* cases. The differences among the members of the *Mishkin* and *Ginzburg* majority court, expressed in separate opinions in *Fanny Hill*, are not as irreconcilable as it might seem. All that Justices Brennan, Warren and Fortas said in their *Fanny Hill* opinion was that if there were such a finding of slight historical or literary value (note that the three Justices did not say that such was required under the record before them) then, under the *Roth test, distribution for such limited purposes* constituted "redeeming social value" under such circumstances and *those* distributions could not be enjoined. The three Justices would have decided the case on a very narrow constitutional issue. They also acknowledged the "pandering" aspects of *Fanny Hill*, and noted that such might be enjoined. See Point F, *infra*.

A.

SUPREME COURT HOLDS VARIABLE APPROACH TO OBSCENITY IS CONSISTENT WITH CONSTITUTIONAL STANDARDS

By far the most important issue resolved by the three decisions was the agreement by a majority of the court that the so-called "variable" approach to obscenity, as the latter term was defined in *Roth-Alberts*, did not offend First Amendment constitutional safeguards. The three decisions taken together constitute a strong endorsement of the American Law Institute Model Penal

prosecutors dated Dec. 7, 1965, he announced a statewide policy to use the "*in rem*" proceedings and threatened to "*nol pros*" any criminal proceedings commenced by local prosecutors against a book distributor or dealer without the prior approval of his office. His office carried out this threat in a New Bedford case. On Nov. 11, 1965, Peter Saba was convicted of selling an obscene book *(Sexus)* and sentenced by the trial judge to one year in jail and fined $1,000. On Jan. 1, 1966, a representative for the attorney general appeared in the district court and nolle prosequied the case!

Code obscenity statute, which codifies the variable obscenity concept, and the CDL Model Obscenity Statute[15] which follows the variable obscenity approach of the Model Penal Code.

1. VARIABLE AND CONSTANT OBSCENITY

In the *Roth-Alberts* case, the majority opinion of the U. S. Supreme Court held that "obscene material is matter which deals with sex in a manner appealing to prurient interest" and announced a constitutional standard for judging obscenity which was to serve as a beacon for federal and state legislatures in drafting obscenity statutes, namely, "whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." As a beacon, the constitutional standard functioned to define the limits of legislative and judicial power in this area of sexual expression.

There was, however, much which was left unanswered by the standard enunciated in *Roth*, the most important being, "Is obscenity a constant quality? (considered in the abstract)" and the subsidiary question, "Whose prurient interest?" Was it always the average person in the community? (presumably a constant factor); or did it refer to the average person of the group to whom the material was aimed? (very definitely, a variable factor). The *Roth* and *Alberts* cases did not raise these issues, nor did that decision develop "all the nuances"[16] of the constitutional standard.

Previous state and federal decisions had taken into account the latter concept, commonly known as "variable" obscenity, which considers not only the subject matter but also its use, i.e. the probable audience of the subject matter. In *Parmalee* v. *U. S.*, 113 F. 2d 729, 731 (D. C. Circuit 1940) Justice Miller of the Circuit Court of Appeals had said, "A book must be considered as a whole, in its effect, not upon any particular class but upon *all those whom it is likely to reach.*" (Our emphasis.)[17]

[15] See "Commentaries on the Law of Obscenity," Vol. 1, No. 1, at pages 43 to 52.

[16] See *Mishkin*, *supra*, at page 62, fn 7.

[17] An instruction to this effect had been cited with approval by the U. S. Supreme Court in *Roth* at page 490: "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. . . ."

Where a pamphlet "Sex Side of Life" for the sex instruction of minors was advertised and distributed in such a manner so as to reach the proper audience, i. e., "adults" and "agencies that have the real welfare of the adolescent in view," it had been held that under those circumstances it was not obscene, *U. S.* v. *Dennett*, 39 F. 2d 564 (2d Circuit 1930). On the other hand, where a book *"Sex Life in England"* which had a limited legitimate audience, i.e., anthropologists, psychotherapists, etc., was so advertised and distributed as to reach those who would buy and use it for its prurient appeal, it had been held that the subject matter was obscene. *U. S.* v. *Rebhuhn*, 109 F. 2d 512, 514-515 (2d Cir. 1940); *U. S.* v. *Burstein*, 178 F. 2d 665 (9th Cir. 1949).

In determining the probable audience, (its use) the nature of the advertising and promotional material, the reputation of the publisher, the channels of distribution and the price of the edition, had all been considered to be relevant on the issue of obscenity.

On the other hand, under "constant" obscenity concepts, the approach is different. Material is dealt with in the abstract, and is classified as "obscene" or "not obscene" independent of the time, place, and circumstances of the material's employment.

Prior to the three decisions on March 21, there was every reason to believe that the constitutional standard voiced in *Roth* would accommodate "variable" obscenity. Not only had the majority opinion in *Roth* cited with approval several of the cases which followed that principle,[18] but it also had cited with approval the 1957 draft of the American Law Institute Model Penal Code which in part is grounded upon that concept.[19] The variable approach had been adopted by Justice Warren in his concurring opinion in *Roth*.[20] The court, however,

[18] *Roth, supra*, at page 489, fn 26.

[19] *Roth, supra*, at page 487, fn 20.

[20] See *Roth, supra*, at p. 495: "It is manifest that the same object may have a different impact, varying according to the part of the community it reached. But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the material is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting. . . ."

in its majority opinion, neither accepted nor rejected Warren's concurring remarks.

2. VARIABLE OBSCENITY IN THE LIGHT OF ROTH STANDARDS

Under the "variable" obscenity approach, the term "obscene" as defined in *Roth-Alberts* functions in accordance with two variable factors: (1) The nature of the materials, and (2) The use of the materials, i.e., the manner in which they are employed.

Under "variable" obscenity, the most objectionable material imaginable (Variable Factor 1) would not be obscene when used by a proper audience (Variable Factor 2).[21] Conversely, material of a less objectionable nature (Variable Factor 1) may be obscene when used improperly, i.e., for the sole purpose of pandering to the prurient interest (Variable Factor 2).[22]

Such evidence may come from either the prosecution or the defense, depending upon who has the burden of going forward with the evidence, and bearing in mind that it is always the prosecutor's burden to establish the violation beyond a reasonable doubt. This was graphically illustrated in the majority opinions in the *Mishkin* and *Ginzburg* cases.

In the "Housewife's Handbook on Selective Promiscuity" counts in *Ginzburg*, the United States Government, during its case in chief, presented evidence tending to establish indiscriminate mailings and Ginzburg's intent to pander. Such was sufficient to support the trial court judgment. Had Ginzburg wished to rely on the book's non-prurient appeal in the hands of a special audience of doctors, etc., it was his burden to introduce evidence in order to overcome the People's *prima facie* case. Cf. *U. S.* v. *31 Photographs, etc.*, 156 F. Supp. 350 (D. C. SDNY 1957), cited with approval in *Ginzburg* at footnote 15, where the trial judge acquitted members

[21] See *U. S. v. 31 Photographs*, 156 F. Supp. 350 (DCSD NY 1957) cited for comparison in *Ginzburg* at p. 40, fn 15. involving the use by Kinsey scientists of what was conceded to be blatant pornography (for research).

[22] See *U. S. v. Rebhuhn*, 109 F. 2d 512 (2nd Cir. 1940) cited with approval in *Ginzburg* at p. 39 and p. 40, fn. 15. where a book "Sex Life in England" having a limited legitimate audience of anthropologists and phychotherapists was indiscriminately advertised and disseminated in the mail.

of the special audience when the purpose of the distribution was shown to be the social value (rather than the prurient interest) to the special audience of sociologists.

In *Mishkin* v. *New York*, the People introduced proof of the appeal of the material to a special audience during their case in chief, which supported the judgment on appeal.

This result is not startling, nor is it inconsistent with the majority decision in *Roth*. Quite the contrary, it draws into focus and clarifies the *Roth* concepts which reject obscenity as "utterly without redeeming social importance" and equate obscenity with "pandering" to the prurient interest. In the former situation the use of the material under the circumstances establishes the material as having "redeeming social importance" whereas in the latter situation the "pandering" use establishes the material as "utterly without redeeming social importance." The court in *Ginzburg* at page 36 defines "pandering" as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."

3. VARIABLE OBSCENITY AS AFFECTED BY THE FORUM

To arrive at a determination under the variable concept, both factors (nature of the material and use of the material) must be present. Thus, the principle functions ideally in the criminal forum, but poorly in the equity forum (injunctive remedy). The former supplies the ingredients necessary to a consideration of the use factor, since the criminal courts consider factual situations and criminal conduct (use). Conversely, in the injunctive or "in rem" action, where historically the action has concentrated on the "thing," the necessary ingredient of use has been lacking. Where used, the "in rem" action, has heretofore been a breeding ground for "constant" obscenity concepts and confusion in the courtroom.[23].

[23] *Attorney General v. The Book Named "Tropic of Cancer,"* 345 Mass. 11, 184 N.E. 2d 328 (1962); *McCauley v. Tropic of Cancer*, 20 Wisc. 2d, 134, 121 N.W. 2d 545 (1963); *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 31 Cal Rptr. 800, 383 P. 2d 152; *Larkin v. G. P. Putnam's Sons*, 14 N.Y. 2d 399, 200 N.E. 2d 760, 252 NYS 2d 71 (1964); *Grove Press Inc. v. Gerstein*, 378 U. S. 577, 84 S. Ct. 1909, 12 L. Ed. 2d 1035, reversing 156 So. 2d 539; *Tralins v. Gerstein*, 378 U. S. 576, 84 S. Ct. 1903, 12 L. Ed. 2d 1033, reversing 151 So. 2d 19. Cf the dissenting opinion of Justice Michael Musmanno, in *Comn v. Robin et al. (Tropic of Cancer)*, — Pa. —, 218 A2 546, Mar. 22, 1966: "But even in the extreme hypothesis that the Gerstein case should be viewed as a precedent of some kind, it can never, under any circumstances, be regarded as a protected work under all circumstances and condition. The majority opinion here, therefore abdicates its responsibilities by arbitrarily stating that Gerstein is all-controlling, all-powerful and all-omniscient."

In the two criminal cases which were before the U. S. Supreme Court for review, variable obscenity was a major issue; in the civil injunction case, it was not.

Variable obscenity was an issue in *Mishkin*, a criminal case, because of (1) the form of the New York statute which proscribed sadistic and masochistic materials, having an appeal to a special audience of sexual deviates and (2) the nature of the People's proof. It was an issue in *Ginzburg*, also a criminal case, (although not argued by the Solicitor General in his brief on appeal) because of (1) the theory upon which the U. S. Attorney tried the case and the nature of the proof at the trial and (2) the interpretation which federal judges (notably the late Justice Learned Hand) had given the federal postal statute in prior federal decisions.

On the other hand, the *Fanny Hill* case was decided by the state court on "constant" obscenity principles, having been tried in a civil action on an injunction. Neither the publisher nor the Government argued variable concepts either during the trial, or in their briefs on appeal.

4. VARIABLE OBSCENITY SHOULD NOW BE CONSIDERED IN CIVIL ACTIONS

Although the *Fanny Hill* result was not the clear-cut decision that the *Mishkin* and *Ginzburg* decisions were, that decision, in many respects, was the most informative.

The *Fanny Hill* decision is of particular importance because of the manner in which the Brennan-Warren-Fortas opinion gratuitously injected "variable" concepts into that action — an action which traditionally had neglected that consideration.

In fact, the "variable-constant" obscenity controversy was the focal point which distinguished the "no clear"

majority *Fanny Hill* result from the clear majority result reached in *Mishkin* and *Ginzburg*. See *Ginzburg* at page 5:

> "This constituted the entire evidence, as neither side availed itself of the opportunity provided by the section to introduce evidence 'as to the manner and form of its publication, advertisement, and distribution,'"

and footnote 3:

> "The record in this case is thus significantly different from the record in *Ginzburg* v. *U. S.*, and *Mishkin* v. *New York* . . ."

In *Fanny Hill*, Justices Brennan, Warren and Fortas split with the White-Clark-Harlan trio (which constituted the majority of six and accepted the variable approach in the *Mishkin* affirmance) because of the unwillingness of Justices Brennan, Warren and Fortas to think in terms of "constant" obscenity (obscenity in the abstract), even in injunction cases.

The dictum in the Brennan, Warren, Fortas opinion, in the only case which did not draw in issue the variable issue, suggests that the variable approach may now be an essential consideration of the injunctive approach if such is to be upheld in the U. S. Supreme Court.

5. VARIABLE OBSCENITY PRECLUDES THE USE OF COMPARABLES WHERE PANDERING IS PROVED DURING THE STATE'S CASE IN CHIEF

Under the concept of constant obscenity which had previously prevailed, there was a split of authority as to whether other materials appearing in commerce and trade were relevant in an obscenity trial.

One body of authority is represented by the rule expressed in *State* v. *Ulsemer*, 24 Wash. 657, 659, holding that the defendant was precluded from using similar materials appearing in commerce and trade in that the same was incompetent because such use would not palliate the use by the defendant. See also *N. Y.* v. *Finkelstein*, 229 N. Y. Supp. 2d 367, 371, cert. denied 371 U. S. 863; *Womack* v. *U. S.*, 111 US App DC 8, 294, F2, 204, 206, cert. denied, 365 US 859.

A refinement of the above rule was expressed by Judge Fox in *U. S.* v. *West Coast News Co.*, 228 F. Supp. 171 (1964) Affd in 357 F2, 855 (1966). In the *West Coast News Co.* case, Judge Fox held that comparables

would only be admissible if a proper foundation had been laid which included the use of a qualified expert on *voir dire* outside the presence of the jury to demonstrate to the trial judge (1) the similarity of the proferred comparables and (2) their acceptability to the standards of the community. In that case the trial judge held that the defendant's burden had not been met.

An opposing view was expressed in *Maryland* v. *Yudkin*, 182 A. 2d 798, 802. It appears, however, that the Maryland Court of Appeals did not consider the above-cited contrary authorities, as no analysis of its conclusion appears in the opinion. The Court cited only Harlan's *concurring* opinion in *Smith* v. *California, supra;* and the California Supreme Court decision in *In Re Harris*, 366 P. 2d 305. An examination of the latter authority, however, reveals that the holding of that case does not stand for the proposition that the admission of allegedly comparable materials is required; only that the defendant under the facts of that case was denied due process because he had been precluded from presenting *any* evidence in his defense.

It seems clear that, under the Court's approval of the variable obscenity approach, the use of allegedly comparable materials is irrelevant where the State's evidence indicates that the defendant was pandering. At the very least, an additional burden is placed upon the defendant in laying the foundation to establish relevancy; namely, that under the circumstances he was not pandering. This is nothing more than an application of the basic rules of evidence. See *Jones on Evidence*, §156, p. 279.

> "While proof of collateral facts may be admitted on the ground that the facts are relevant to the issues in the case, there is one condition that is implicit in substantially every case in which such facts are received in evidence: A rational similarity or *resemblance between the conditions giving rise to the fact offered and the circumstances surrounding the issue or fact to be proved.* Thus it may be competent to explain the nature of objects by experiments and by comparison with other objects, *providing that preliminary proof is made that the conditions are the same.*" (Our emphasis.)

B.

SUPREME COURT HOLDS "HARD CORE PORNOGRAPHY" RULE AN INCORRECT INTERPRETATION OF ROTH-ALBERTS

An equally strong setback for the smut industry was the U. S. Supreme Court's pronouncement in *Mishkin* that the so-called "hard-core pornography" test was no part of the *Roth-Alberts* constitutional standard.[24]

The ruling of six justices in the *Mishkin* case at page 60 that:

> "The definition of 'obscene' adopted by the New York courts . . . (in *People v. Richmond County News)* delimits a narrower class of conduct than that delimited under the *Roth* definition."

and at page 61, the so-called "hard-core pornography" interpretation of the *Richmond County News Company* case:

> "is more stringent than the *Roth* definition."

upset the reasoning of High Courts in New York, Massachusetts and California which had previously established the hard-core pornography rule in those states under the mistaken assumption that only hard-core pornography could be proscribed under the *Roth-Alberts* decision.

The hard-core pornography interpretation sprang into existence in 1961 in the *Richmond County News Company* case[25] through a misinterpretation of the *Roth* test by two members of the New York Court of Appeals. In that case, after a fact-finding by three judges at the trial level and five judges in the Appellate Division, that the April 1957 edition of the girlie magazine *Gent* was obscene under the New York statute, the New York Court of Appeals in a four-to-three vote reversed the criminal conviction on the grounds that the prohibition of the New York Penal Statute applied only to hard-core pornography.

---

[24] See Note 9. See generally "Modern Concept of Obscenity, Section 6, Hard-core Pornography," appearing in 5 ALR 3rd, 115 at 1176.

[25] *New York v. Richmond County News Company*, 175 N.E. 2d, 681 (May 25, 1961).

Although four justices in the *Richmond County News Company* case voted for reversal, two of these, Justices Desmond and Dye, did so because they considered themselves restrained by *Roth-Alberts*, which they interpreted to permit the proscription of hard-core pornography only. Justices Fuld and Van Voorhis, on the other hand, interpreted the New York statute to go beyond the *Roth-Alberts* test by proscribing hard-core pornography only.

The same erroneous reasoning soon spread to the High Courts of the two other states. One year later, the Supreme Judicial Court of Massachusetts followed the New York lead and accepted the hard-core pornography interpretation[26] also by a four-to-three majority, leaning on the result reached by the slim majority of the New York court in the *Richmond County News* case. The following year, the California Supreme Court ruled similarly[27] but this time by a seven-to-nothing majority, relying on the results reached by the slim four-to-three majorities of the New York and Massachusetts courts.

The successful inroads made by the hard-core rule in New York, Massachusetts and California during 1961-1963 can be attributed to the failure of the U. S. Supreme Court in its opinions between 1957 and 1966 to get across the idea that a reversal on procedural grounds was in no way a reflection of the majority's view on the obscenity of the subject matter, or the criminal culpability of the purveyors involved.[28]

The state courts failed to give proper weight to the prior restraint issue which existed in the U. S. Supreme Court reversals following *Roth*, and were unable to discern the differing results reached by the U. S. Supreme Court in its review of criminal[29] and prior restraint

---

[26] *Attorney General v. Book Named "Tropic of Cancer."* 344 Mass. —, 184 N.E. 2d 328, 333 (July 17, 1962).

[27] *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 31 Cal. Rptr. 800, 810 (July 2, 1963).

[28] The prosecutors are equally at fault. As a practical matter they should have understood what the Court was doing when it denied *certiorari* or dismissed appeals in 22 criminal cases in the intervening seven years, notwithstanding the general understanding that the denial of *certiorari* does not merit the position of *stare decisis*.

[29] See "Commentaries on Law of Obscenity," Vol. 1, No. 1, pp 15-24.

cases. While the California Supreme Court[30] did recognize the prior restraint issue, they failed to weigh the issue in the light of the results reached in the many other criminal cases treating conduct, which had been appealed to the U. S. Supreme Court during the same period and denied review.

The failure of the U. S. Supreme Court in its previous opinions to articulate the actual state of the law has been amply corrected by the majority opinions in the *Mishkin* and *Ginzburg* cases. Happily, the damage occasioned is not irreparable. It is reasonable to expect that, as a result of the *Mishkin* ruling, the New York, Massachusetts, and California High Courts and the respective state legislatures will be called upon in the future to correct the erroneous interpretation by reevaluation in the judicial forum and by new legislation.

A move in that direction has already commenced in California. On May 3, 1966, the proponents of an initiative measure in California filed 554,530 voter signatures with the Secretary of State asking that a new obscenity statute be placed on the ballot in the November general election. The proposed state obscenity statute (initiative) would replace the existing California State statute which has been given a "constant obscenity" - "hard-core" interpretation with one drafted along the lines of the American Law Institute, Model Penal Code (variable obscenity), given the U. S. Supreme Court's stamp of approval in *Mishkin* and *Ginzburg*. 468,259 valid voter signatures (8% of the registered voters in 1962) are necessary in order for the measure to qualify for submission to the General Electorate.

In Massachusetts, the attention of the Legislature is invited to the remarks of Chief Justice Wilkins in his dissent in the Massachusetts case which adopted the hard-core pornography rule in Massachusetts. "Because of its impact . . . the majority decision will have a wide practical effect. It should lead to legislative reexamination of the entire field."

It now appears that the dissent of Justice Froessel,

[30] *Zeitlin v. Arnebergh* at p. 810, fn 23. The California Supreme Court also leaned heavily on Justice Harlan's view of hard-core pornography, but failed to recognize that Justice Harlan would not apply his restriction to state cases.

concurred-in by Justices Burke and Foster, is the correct statement of the law. New York law enforcement officials would do well to use Justice Froessel's fine dissent as a weapon and move to correct the New York situation by either (1) seeking a reinterpretation of the New York Obscenity statute by the New York Court of Appeals or (2) amending the Obscenity Statute so that it codifies the law expressed in *Roth-Mishkin-Ginzburg*. In the latter situation, logic points to the Obscenity Statute of the American Law Institute, Model Penal Code which, if enacted, would overrule such unfortunate results as the *Richmond County News Company* case *(Gent); Larkin* v. *G. P. Putnam's Sons*, 14 N. E. 2d 399 (July 10, 1964) *(Fanny Hill); New York* v. *The Bookcase et al.*, 14 N. Y. 2d 409 (July 10, 1964) *(Fanny Hill-Minors)*; and *Larkin* v. *G. I. Distributors, Inc.*, 14 N. Y. 2d 399 (July 10, 1964) (Girlie Magazines).

C.

SUPREME COURT APPROVES "SCIENTER" REQUIREMENT OF NEW YORK STATUTE. REJECTS ARGUMENT THAT PEOPLE HAVE BURDEN OF PROVING SUBJECTIVE KNOWLEDGE. — AVOIDS "HONEST MISTAKE" ISSUE.

1. AN INTRODUCTION TO SCIENTER

One of Miskin's points on appeal was that the State had failed to prove "scienter." His argument had two prongs: (1) that the People's burden of proof under the New York statute was to show that the defendant *knew* (subjectively) that the subject matter was obscene, and (2) that the People's evidence had not met that burden.

Although the identical arguments had earlier been considered and rejected in *New York* v. *Finkelstein*, 11 N. Y. 2d 300, 229 NYS 2d 367, 183 NE 2d 661, cert. den. 371 U. S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962), the ruling of the U. S. Supreme Court on this issue in *Mishkin* is important because it was the first case in which the Court had written an opinion on the "scienter" issue since its landmark decision in *Smith*

v. *California*, 361 U. S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959), established scienter as a constitutional requirement.

The majority opinion in *Mishkin* made it quite clear that proof of subjective knowledge was not a constitutional requirement. Its construction that the New York statute required proof equivalent to "knowingly or recklessly" avoided the "honest mistake" issue, which had been left undecided in the *Smith* case.

To grasp the full significance of the *Mishkin* decision on "scienter," requires a clear understanding of the "scienter" problem background, including the Court's decision in the *Smith* case.

(a) The *Smith* Case Adds Scienter As a Constitutional Requirement

The "scienter" requirement came into the law through Justice Brennan's opinion in *Smith* v. *California (supra)*.

Eleazar Smith operated a retail book and magazine store in Los Angeles. Among his stock was a book entitled *Sweeter Than Life* by Mark Tryon, published by an obscure publisher, Vixen Press. A Los Angeles police officer bought some magazines and a copy of the book from a clerk in Smith's store and then arrested the clerk.

At the time of Smith's arrest, two obscenity laws were operative in the Los Angeles jurisdiction: The California State Obscenity Statute, and a Los Angeles City Ordinance on Obscenity. Smith was charged only with a violation of the City Ordinance. The difference in the two statutes is explained by Judge Swain in his dissenting opinion in *People* v. *Smith*, C. R. A. 3792, 237 P. 2d 636 (June 23, 1958), which affirmed Smith's conviction at page 641):

> "A defendant is not guilty of violating Penal Code Section 311 *unless he had knowledge of the character of the material. People* v. *Wepplo, supra*, 947, 78 Cal. App. 2d 959, 964, 178 P. 2d 853. *To the word 'knowledge' we would add 'or notice,' meaning thereby knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials.* To appear profound, we refer to this knowledge or notice as 'scienter.' Under the city ordinance the prosecution does not have to prove scienter; under the Penal Code section, it does . . ." (Our emphasis.)

The trial court found Smith guilty and sentenced him to 30 days in jail. The Appellate Department of the Superior Court affirmed the judgment.

On appeal to the U. S. Supreme Court, Justice Brennan in the majority opinion (joined by Warren, Clark, Stewart and Whittaker) ruled that a state cannot constitutionally eliminate all mental elements from the crime; to do so seriously restricted the dissemination of books that are not obscene.

If "mental element" was a requirement for criminal prosecution, then, what was the state of mind that had to be proved? How great or how slight was that burden of proof? How do the people, in fact, establish such proof? These were all matters of great concern to the countless numbers of municipal, county, and state governments and their prosecutors, whose "non-scienter" ordinances and statutes would fall with the Los Angeles City ordinance in the *Smith* decision.

(b) The Mental Element (Defendant's State of Mind)—Must It Be Subjective Or Objective?

As to the prosecutor's concern regarding a "scienter" requirement, consider the "state of mind" spectrum where "subjective knowledge" is concerned, as applied to a person who has sold a book which is obscene as a matter of fact. Degrees of "subjective knowledge" are listed in inverse order:

(1) He may have been aware of the fact that the material was obscene from personal evaluation (knowledge of fact);

(2) He may have believed the fact the material was obscene, but his awareness was not from personal evaluation (knowledge of fact);

(3) He may have been aware that he had not the slightest notion whether the book was obscene or not (avoidance of knowledge);

(4) He may have believed the book not obscene, but have had no reasonable grounds for his belief (knowledge contrary to fact — criminal negligence);

(5) He may have believed the book not obscene, but have had reasonable grounds for his belief (knowledge contrary to fact — reasonable grounds) (honest mistake).

At common law an honest and reasonable belief in the existence of circumstances, which if true, would make the act for which the person was charged an innocent act, category (5), constituted a good defense.

Several statutory crimes are to be noted as exceptions however — situations in which the deed, even under the circumstances as they were reasonably supposed to be, involved such a degree of social fault that the actor was held to have acted at his own peril. Statutory rape is such an offense. The state of mind in category (5) has generally been interpreted by the courts to be no defense. One who has unlawful intercourse with a girl under the age of consent is guilty of statutory rape although he *reasonably* believed she was over that age. See, however, *California* v. *Hernandez*, 39 Cal. Rptr. 361 (July 9, 1964), where the California Supreme Court gave a new interpretation overruling long-standing precedent.[31]

(c) What The *Smith* Case Said About the *"Mental Element"* Requirement And The State's Burden Of Proof.

The Supreme Court noted in its majority opinion in *Smith* at page 153, footnote 9, that:

> "The common law prosecutions for the dissemination of obscene matter strictly adhered to the requirement of scienter . . . Cf. . . . American Law Institute, Model Penal Code, Section 207.10 (7), tentative draft No. 6, May 1957, and Comments, pages 49-51.[32]

---

[31] The California Supreme Court noted however that the decision was based on "legislative intent":

> "We hold only that *in the absence of a legislative direction otherwise*, a charge of statutory rape is defensible wherein a criminal intent is lacking." (Our emphasis.)

Although the philosophical bend of the California justices runs contrary to that expressed by their predecessors, the path is open for the people, through their legislators, to overrule the philosophy of the *Hernandez* case.

[32] The American Law Institute, Model Penal Code, Commentary at p. 49 reads:

> "Under prevailing obscenity laws, the prosecution must prove that defendant knew or, *at least was reckless* as to the presence of objectionable material in a book or other publication disseminated by him. *It does not have to prove that defendant was aware of the evil tendency of the material.* . . ." (Our emphasis.)

> "The general California obscenity statute, Penal Code Section 311 requires scienter,[33] see note 3, and was of course sustained by us in *Roth* v. *U. S.*"

The Court answered the People's fears that the prosecution of obscenity would be impossible if a "scienter" requirement were introduced, at page 154:

> "It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim *knowledge of their books' contents or falsely deny reason to suspect their obscenity.* We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. See Pound, "The Role of the Will in Law," 68 Harvard Law Review 1, cf. *American Communications Association* v. *Douds*, 339 U. S. 382, 411, 94 L. Ed. 925, 950, 70 S. Ct. 674. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element *in proving his awareness of its contents.* The circumstances may warrant the inference that he was aware of what a book contained, despite his denial."

The Court did, however, leave a small area undecided — whether the defense of "honest mistake" in certain cases might be essential as a matter of constitutional principle, at page 155:

> "We need not and most definitely do not pass today on . . . whether honest mistake as to whether its contents in fact constituted obscenity need be an *excuse* . . ." (Our emphasis.)

On this point see category (5) of "The Defendant's State of Mind" noted above.

It seems clear from the above language that the Court was *not* considering "scienter" in the narrow terms of the seller's "subjective knowledge" that the matter was obscene. Categories (3) and (4) were not exempted; category (5), "honest mistake," was the only question mark.

---

[33] See the interpretation given California Penal Code, Section 311 by Judge Swain in CRA 3792 *(supra)*, making use of the "reasonable and prudent man" test.

At the very least[34] the Court, in its opinion in *Smith* at page 212:

> "We need not and most definitely do not pass today on what sort of mental element is requisite for a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether the contents in fact constitutes obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate farther, or might put on him the burden of explaining why he did not, and what such explanation might be . . ."

seems to be saying that where the proof shows that (1) the material is in fact obscene, and (2) the seller has knowledge, or is aware of the contents or nature of the materials, a *prima facie* case[35] within constitutional limitations will have been established on the scienter issue to permit the matter to go to the jury. This should be so, because a person can be charged with knowledge

---

[34] Although the Court, in *Smith* said:

"We need not and most definitely do not pass today on what sort of mental element is requisite for a constitutionality permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether the contents in fact constitutes obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate farther, or might put on him the burden of explaining why he did not, and what such explanation might be . . ."

only the first caveated area, that of "honest mistake," relates to the subjective state of mind of the defendant, and there, the area of doubt is whether or not it shall be a *defense*. This would not be a concern of the people's case in chief. It would only be a consideration if offered as a defense, and then, as to whether additional evidence were necessary in *rebuttal*. The remaining caveats relate not to the defendant's state of mind but rather to whether or not the burden of proof may be shifted, as suggested by the drafters of the Model Penal Code, in their alternate proposals in the 1957 draft. See text, *infra*.

[35] *Prima facie* evidence is sufficient to outweigh the presumption of innocence, and, if not met by opposing evidence, to support a verdict. 219 U. S. 219, quoting 6 Pet. 632.

of the community standards and what a jury may decide to be obscene at any given time. See *Rosen* v. *U. S.*, 161 U. S. 606 (1896), cited for this latter proposition by the modern court in the *Roth-Alberts* case at 491, fn. 28.

(1) Subjective Knowledge as Affected by the *Rosen* Case.

The *Rosen* case held subjective knowledge of obscenity irrelevant. There the defendant was convicted under a federal statute which made it a misdemeanor to "knowingly deposit obscene matter in the mail." The trial court had refused to give a jury instruction which provided that the jury must acquit if it entertained a reasonable doubt whether the defendant *knew* that the matter was obscene. On appeal, the U. S. Supreme Court said at page 610:

> "The statute is not to be so interpreted. The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice, at the time, of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. *Congress did not intend that the questions as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States.* The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute had been violated. Everyone who uses the mails of the United States for carrying papers or publications must take notice[36] of what, in this enlightened age, is meant by decency, purity, and chastity in social life and what must be deemed obscene, lewd and lascivious." (Our emphasis.)

Any doubt that the *Rosen* case is still the law on this point should have been dispelled by the approval given to this very quotation in *Roth* v. *U. S.*, 354 U. S. 476, 291 at fn 28. In short, when one deliberately enters the

---

[36] We read this as a complete answer to the defense argument that the prosecution must prove community standards during its case in chief.

distribution field of material of a sexually descriptive nature, he takes the risk of offending current community standards and must be held accountable if he does. If it be thought that this puts too great a burden of prescience on defendants, the answer is, in the words of Mr. Justice Holmes, in *Nash* v. *U. S.*, 229 U. S. 373, 377, cited in *Tyomies Publishing Co.* v. *U. S.*, 211 F. 385:

> "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine, or a short imprisonment, as here, he may incur the penalty of death. An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it by common experience in the circumstances known to the actor. The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw . . ."

(2) Do the Facts of the *Rosen* Case Give Rise to a *Prima Facie* Presumption of Knowledge?

No matter how strict the language of the statute setting forth the scienter requirement, and independent of whether "honest mistake" is a defense, proof by the People that a defendant had knowledge of the contents of the material found to be obscene, should, at the very least, under the *Rosen* rule, establish a *prima facie* case against the defendant, functioning like a *prima facie* presumption.

Although it is fundamental to the criminal law that a defendant is presumed to be innocent until the contrary is proved, that the burden of proving the contrary rests with the People all during the trial, and that in case of a reasonable doubt the defendant is entitled to acquittal, such principles are subject to a number of practical exceptions.

One of the exceptions is that the burden of going forward with the evidence[37] may be shifted to the de-

[37] The burden of going forward with the evidence (not the burden of proof) has been termed the burden of producing evidence and means the obligation of a party to introduce evidence where necessary to avoid the risk of a preemptory finding against him on a material issue of fact. *California Evidence*, Witkin at page 71. See also *McCormick on Evidence*, page 636.

fendant by a presumption which meets the test of constitutional due process: i.e., where there is a rational connection between the facts proved (as here, that the subject matter is obscene and that the defendant had knowledge of the contents of the subject matter) and the additional facts presumed (that the defendant was aware the subject matter was obscene). See *California Evidence*, Witkin, at page 74.

(3) Model Penal Code Drafters Recommend a *Prima Facie* Presumption of Knowledge.

The American Law Institute, Model Penal Code (1957 draft), Section 207.10 offered two alternatives to the prevailing statutory law on "scienter." Both were designed to change the prevailing law on "scienter" in the obscenity area. See the Reporter's comments to the American Law Institute, Model Penal Code (1957 draft), Section 207.10 at page 49 et seq.:

> "Prevailing law is even rougher, absolutely precluding any defense based upon defendant's misappraisal of the tendency of the material . . ."

One proposal suggested shifting the burden of proof from the People to the defendant. This is accomplished by creating a rebuttable presumption of knowledge in the defendant's act of dissemination, etc., and placing the burden on the defendant to overcome the presumption by a "preponderance of evidence" to the contrary. An alternative scheme in the 1957 draft suggested the same rebuttable presumption of "knowledge" but left with the People the burden of proving "scienter" beyond a reasonable doubt. The 1962 Model Penal Code abandoned the first proposal and settled on the latter.

Section 251.4 (2) of the 1962 Model Penal Code provides in part:

> "(2) Offenses. Subject to the affirmative defense provided in Subsection (3), a person commits a misdemeanor if he *knowingly or recklessly:* (a) sells, etc., any obscene writing, etc. . . . *A person who disseminates or possesses obscene material in the course of his business is presumed to do so knowingly or recklessly* . . ." (Our emphasis.)

The *prima facie* presumption voiced in the 1962 draft arises from proof of "possession . . . in the course of business" whereas, under our analysis of *Rosen*, the presumption there would arise from proof of "knowledge

of the contents." It thus appears that the 1962 draft of the Model Penal Code follows the *Rosen* case, except that by employing "knowingly or recklessly" as the "scienter" requirements, the possibility of acquittal for honest mistake is permitted, as a matter of defense.

Referring to the five categories described in "The Defendant's State of Mind," *supra*, a person would be criminally liable under the 1962 provisions of the Model Penal Code if he were shown to have the state of mind described in categories (1) or (2), (knowingly) or the state of mind described in categories (3) or (4), (recklessly). Conversely, it would be possible for the defendant to gain acquittal, if he were able to establish in his defense that his state of mind was not that of categories (1), (2), (3) or (4) but was that of category (5).

2. MISHKIN'S STRATEGY

Three separate and distinct "scienter" claims are commonly made by defendants in obscenity cases: The first two attack the adequacy of, and the proper construction to be given to the statutory language; the third challenges the adequacy of the evidence at the trial to meet the burden of proof on scienter established by the statutory language employed.

Under the first contention, where the challenge is to the adequacy of the statutory language, the claim is made that the criminal statute, in its definition of the People's burden of proof on the scienter issue, fails to meet the constitutional standards for scienter described in the *Smith* case.

Under the second contention, where the challenge is to the proper construction to be given to the statutory language, the statutory language is conceded to be adequate to meet the constitutional standard for scienter set by *Smith*, but challenge is offered to the meaning of *Smith*, and thus, to the construction to be given to the statutory language employed.

Under the third contention, where the adequacy of the evidence on scienter offered at the trial is challenged, the contention is that the evidence established by the People at the trial does not satisfy the People's burden of proof on scienter, as set forth in the statute.

Where, as in the second contention noted above, there is no challenge to the language of the statute as such, but only to its meaning, the argument will appear as

a part of the third claim (i. e., that the proof offered at the trial is insufficient to meet the burden of proof imposed by the language of the statute, *as interpreted by the defendant*). *Mishkin's* attack on scienter took this form in his appeal. The heading of his argument read, "There is no proof that the defendant *knew* the books were obscene . . ." (Our emphasis.)

Mishkin's argument, as mentioned at the outset, had two prongs: (1) that the People's burden of proof under the New York statute was to prove beyond a reasonable doubt that the defendant knew (subjectively) that the subject matter was obscene, and (2) that the People's evidence had not met this burden. In his brief, he argued at pages 14 and 15:

> "There is not a scintilla of proof that the appellant knew the books to be obscene or sadistic or masochistic. He might have known they were erotic, but that knowledge is not sufficient."
>
> "It is not a satisfactory answer to this problem that if proof of knowledge of the obscene character is to be required, then it would not be possible to prosecute for this crime . . ."
>
> ". . . nor is it necessary for the appellant to offer suggestions as to how such proof is to be presented. The burden is on the prosecutor to justify the suppression of publications, and it is for it to discover the method for sustaining the burden . . ."

This was the same argument that had been made and rejected in *New York* v. *Finkelstein*, 11 N. Y. 2d 300, 229 N. Y. S. 2d 367, 183 N E 2d 661, cert. den. 371 U. S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962), which had twice been before the New York Court of Appeals. In those decisions the New York Court of Appeals had "authoritatively interpreted"[38] the scienter requirement of the state obscenity statute, in a manner which was contrary to Mishkin's urging.

(a) An Analysis Of The Two *Finkelstein* Appeals

(1) The Court of Appeals in 1961 Reads Scienter into the New York Statute.

The first *Finkelstein* case had been tried before the *Smith* case was decided. The trial judges however did not render their decision until after the United States Su-

[38] See *Mishkin* at page 62.

preme Court had rendered its decision establishing the scienter requirement. Although Section 1141 of the Penal Law did not have a specific scienter requirement, the trial judges "read" the requirement into the statute and found the defendant guilty. When the case reached the New York Court of Appeals for the first time in *New York v. Finkelstein*, 9 N. Y. 2d 342, 174 N. E 2d 470 (March 30, 1961), the Court of Appeals "interpreted" the statute to require the "vital element of scienter" which it interpreted as "awareness of the contents," at page 471.

> "In *Smith v. People of State of California* . . . the United States Supreme Court declared unconstitutional a Los Angeles City ordinance which proscribed, and was construed to impose strict liability for mere possession of obscene prints, regardless of the offender's *awareness of the contents.* The New York proscription, on the other hand, neither expressly, nor by our construction here, dispenses with this *vital element of scienter,* and therefore, in no way impinges upon the traditional freedom guarantees of speech and press *(Roth v. U. S.)* . . ." (Our emphasis.)

Speaking further on the scienter requirement (burden of proof) which the Court had read into the statute in its decision, the Court there said at page 471:

> "A reading of the statute as a whole clearly indicates that only those who are *in some manner aware of the character of the material* they attempt to distribute should be punished. *It is not innocent but calculated purveyance of filth* which is exorcised . . ." (Our emphasis.)

The Court sent the case back for retrial however, feeling that "new trials were warranted by the circumstances and in the interests of justice, so that, although the People have the burden of proof defendants may have an opportunity to testify or offer proof, if they desire, *in regard to the presence of salacious literature in their possession for sale.* . . ." (Our emphasis.)

When the case was retried, the defense again offered no testimony and on August 30, 1961, Finkelstein was again convicted. Nine months later the second conviction was before the New York Court of Appeals on the second appeal in *New York v. Finkelstein*, 11 NY 2d 300, 229 NYS 2d 367 (May 17, 1962). This time in his appeal Finkelstein argued contention (2) and contention (3), i.e., the People's evidence has failed to meet the burden of proof on scienter, and that the People's burden of proof as he construed the New York Court of Appeals' previous ruling in the first *Finkelstein* case was that of proving specific intent, i.e., that he, Finkelstein, knew that the books were "obscene."[39]

(2) The Court of Appeals in 1962 Upholds State Evidence as Establishing a *Prima Facie* Case Under the Scienter Requirements.

The *prima facie* evidence[40] against Finkelstein was uncomplicated. At the time of Detective Dell's purchase from an employee, Finkelstein, the owner of the store entered. Dell told him, "You know those two books are pornographic." Finkelstein replied, "It all depends on how you look at it. I have seen much worse than this. . ."

In answering Finkelstein's claim regarding the burden of proof and scienter as it was related to the burden of proof, the Court of Appeals stressed the fact that knowledge of the contents of the book had been established, beyond a reasonable doubt, at page 305:

> "Both defendants presently contend that the proof failed to establish scienter. In our opinion, however, *scienter — 'knowledge by . . . (defendants) of the contents of the books' (Smith v. California,* 361 U. S. 147, 149, 80 S Ct. 215, 216, 4 L Ed 2d 205) — was sufficiently proved beyond a reasonable doubt. As the Supreme Court of the United States said in *Smith v. California, supra,* page 154, 80 S. Ct., 219: 'Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.' The voluntary admission on the part of each defendant that he had seen worse books than those here involved, the lurid statements on the front cover of each paper covered book, taken together, warranted the trial court's con-

---

[39] *Finkelstein's* brief, pp. 10-13.

[40] The argument that "recklessness" (category (4)) was not within the "calculated purveyance" requirement of the first *Finkelstein* appeal, was muted by the opinion in the second *Finkelstein* appeal, considering the nature of the *prima facie* evidence.

clusion that scienter was established beyond a reasonable doubt. . . ." (Our emphasis.)

The U. S. Supreme Court denied Finkelstein's petition for *certiorari* in *Finkelstein v. New York*, 371 U. S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962).

(b) *Mishkin* Adopts *Finkelstein* Approach

The *Mishkin* strategy followed that employed by *Finkelstein*. *Mishkin* did not testify nor did he offer any evidence in his defense.

The People's case against *Mishkin*, however, was in marked contrast to that presented against *Finkelstein*. The transcript of the People's case in chief against *Mishkin* ran to over 500 pages.

On appeal, his main defense, other than that the material was not obscene, was that the scienter requirement voiced by the New York Court of Appeals in the first *Finkelstein* case called for proof of a specific intent that Mishkin distributed the materials knowing (subjectively) the materials were obscene, and that the People's evidence did not meet the burden of proof.

In replying to Mishkin's contention regarding the construction to be given to the New York Court of Appeals' language in the two *Finkelstein* cases (cf. contention (2) above), the U. S. Supreme Court was required to construe the manner in which the different language in both cases was employed: one spoke of "aware of the character of the material," the other of "knowledge of the contents."

Pointing to the New York court's remarks in the second *Finkelstein* case which equated "scienter" with "knowledge of the contents" Justice Brennan indicated that the High Court interpreted that language as consistent with, rather than a modification of the New York court's previous scienter interpretation that "only those who are in some manner *aware of the character of the material* they attempt to distribute should be punished" and that "calculated purveyance of filth is exorcised," voiced in the first *Finkelstein* case. The New York Statute required less than actual subjective knowledge, but more than "innocent" purveyance. In this regard, Justice Brennan cited the scienter requirement of Model Penal Code Section 251.4 (2), and the Commentary, Model Penal Code (Tentative Draft No. 6 1957) 14 at pages 49 to 51, both of which Justice

Brennan described as expressing a "similar" requirement.[41] Section 215.4 (2) of the Model Penal Code (1962) cited by Justice Brennan provides that: ". . . a defendant commits a misdemeanor if he knowingly or recklessly . . . sells, etc. . . . obscene matter," and establishes a rebuttable presumption from the fact of possession for sale of obscene matter:

> "A person who disseminates or possesses obscene material in the course of his business is presumed to do so knowingly or recklessly . . . ."

3. SUPREME COURT'S RULINGS ON SCIENTER ISSUES

(a) Proof of Subjective Intent Held Not a Constitutional Requirement—Model Penal Code Provisions Approved

Having cited Model Penal Code, Section 251.4 (2) as having a scienter requirement "similar" to the New York standard, which it approved, it follows that the Court in *Mishkin* also approved the "knowingly or recklessly" requirement of the Model Penal Code as fulfilling the constitutional requirements.

As noted above, a person would be guilty under the "recklessly" standard of the Model Penal Code either where he purposely avoided making a judgment on the material (category (3)), or where he personally was of the belief that the material was not obscene, but had no reasonable grounds for the belief (capegory (4)). It therefore is the law that there is no constitutional requirement that the People's evidence show that a defendant knew subjectively that the material was obscene.

(b) Court Again Avoids Issue Of "Honest Mistake"

Justice Brennan, having construed the New York statute to be the equivalent of the Model Penal Code Section 251.4 (2) and, thus to permit the possibility of acquittal for honest mistake as a matter of defense, found the area of doubt reserved in *Smith* beyond challenge, at page 63:

> "Appellant's challenge to the validity of Section 1141 founded on *Smith v. California*, 361 U. S. 147, 4 L Ed 2d 205, 80 S. Ct. 215, is thus foreclosed, and this construction of Section 1141 makes it unnecessary for us to define today 'what sort of mental ele-

---

[41] See *Mishkin*, p. 63, fn. 9.

ment is required to a constitutionally permissible prosecution'. Id at 154, 4 L. Ed. 2d at 212 . . ."

Whether "honest mistake" as to whether the contents in fact constitute obscenity need be an excuse as a matter of constitutional principle remains undecided today.

A strong argument can be made that the *Mishkin* Court, in approving the scienter provision of the Model Penal Code and in citing the Commentary to the 1957 draft also gave support to the special presumption therein, inasmuch as the latter is such an integral part of the Model Penal Code scienter scheme.[42] The Commentary Model Penal Code describes its treatment of scienter on page 50 as:

> "Since 'predominant appeal to prurient interest' is a material element of obscenity, the prosecution would have the burden of proving knowledge or recklessness as to this quality of the materi . . . we believe it appropriate to have special provisio . because of the high probability that persons disseminating obscenity do know the contents and quality of what they disseminate and because of the exceptional difficulty of disproving beyond a reasonable doubt a defendant's assertion that the prurient appeal of the accused material was not apparent to him." . . . . "Accordingly we propose . . . to establish a presumption."

The facts of the *Finkelstein* case lead one to believe that the Court of Appeals was thinking somewhat along the lines of the drafters of the Model Penal Code when it sent the case back for retrial so that the defendant could come forward with testimony or proof to explain the "presence of salacious literature in their possession." At page 472:

> "Although the people have the burden of proof defendants may have an opportunity to testify or offer proof, if they desire, in regard to the presence of salacious literature in their possession for sale . . . ."

For other courts which have seen the wisdom in either an inference or a rebuttable presumption in such cases, see *Minnesota v. Oman*, 261 Minn. 10, 22, 110 N. W. 2d 514, 523 (Sept. 1, 1961); *Connecticut v. Andrews*, 150 Conn. 103, 186 A2d 546, 552 (Nov. 6, 1962); *New Jersey*

[42] See note 34, *supra*. The adequacy of the People's proof, however, did not depend upon the existence of a presumption.

v. Hudson County News Co., 41 N. H. 247, 196 A2d 225. 231 (Dec. 13, 1963); *State v. Miller*, 145 W. Va. 59, 112 SE2d 472, 478.

(c) Court Holds Evidence Meets States Burden Of Proof Under The New York Statute

Having concluded Mishkin's first argument against him, Justice Brennan reviewed the People's evidence and ruled his second claim, i.e., the evidence did not meet the People's burden of proof, was also without merit, at page 63:

> "Appellant's principal argument is that there was insufficient proof of scienter. This argument is without merit. The evidence of scienter in this record consists, in part, of appellant's instructions to his artists and writers; his efforts to disguise his role in the enterprise that published and sold the books; the transparency of the character of the material in question, high-lighted by the titles, covers, and illustrations; the massive number of obscene books appellant published, hired others to prepare, and possessed for sale; the repetitive quality of the sequences and formats of the books; and the exorbitant prices marked on the books. This evidence amply shows that appellant 'was aware of the character of the material' and that his activity was 'not innocent but calculated purveyance of filth.'"

D.

MAJORITY OPINION CITES A. L. I. M P. C. FOUR TIMES WITH APPROVAL

The Court in its majority opinion in *Ginzburg* had occasion, in three additional instances, to cite with approval the American Law Institute, Model Penal Code and its concepts. Those who, after reading the *Mishkin*, *Ginsburg*, and *Fanny Hill* decisions, are unable to chart the path which the majority of the United States Supreme Court are taking out of the "thicket" would do well to look to the following Model Penal Code references, cited by the Court in its footnotes:

1. Tentative Draft No. 6 (May 6, 1957), A.L.I., Model Penal Code, pages 1-3, 13-17, 45-46, 49-51, 53.
2. Proposed Official Draft, Model Penal Code, Sections 251.4 (2) and (4) and comments thereto.

3. Schwartz, Moral Offenses and the Model Penal Code, 63 Col. L. Rev. 669, 677-681 (1963).

It should be borne in mind, in relating the *Fanny Hill* opinions to the Model Penal Code concepts, that the latter was not drafted with civil proceedings in mind. The reporter to the 1957 draft comments at page 54:

> "The Model Penal Code deals exclusively with the use of afflictive sanctions to promote public policy. We therefore do not undertake to pass judgment on various non-penal measures that are employed or proposed to suppress obscenity, such as: civil determination of the issue of obscenity through injuction or declaratory judgment proceedings. . . ."

As noted by Louis B. Schwartz, co-reporter for the Model Penal Code, in the above law review article, the American Law Institute, in drafting the Model Penal Code, blended both "constant" and "variable" concepts. "Variable" obscenity concepts are employed in its provisions dealing with distributions to children and specially susceptible audiences. In other situations, it adheres to "constant" obscenity concepts, utilizing the "average person" in the determination of obscenity *vel non*, but providing explicit exemptions for justifiable transactions in the obscene (transactions by persons with scholarly, scientific, or other legitimate interests in the obscene).

The Model Penal Code "hybrid" approach differs from the straight variable approach in that the latter, instead of holding material obscene and granting an exemption because of the nature of the transaction (scholarship, etc.), would hold the material not obscene under the circumstances. See *U. S. v. 31 Photographs (supra)*.

If there is an indication of any tendency of the *Mishkin* majority court to detour from the approach used in the Model Penal Code, it is that Justices Brennan, Warren, and Fortas may be reluctant to commit themselves fully, in civil cases dealing with obscenity *vel non*, to the Model Code provisions which follow "constant" concepts. There are indications of this in the approach they adopted in their *Fanny Hill* opinion.

On the other hand, Justices Clark and White followed the "constant" obscenity aspects of the Model Penal Code, even though the matter under review was not a criminal case. Their opinions, which we roundly applaud and in which we find no fault, would have been more encompassing had they reduced to writing that which their silence gave testimony of regarding the issue raised in the Brennan-Warren-Fortas opinion. In this regard, they need only have added an additional sentence, such as, "To upset the judgment of the lower court by anticipating an attempt on the part of the Commonwealth to use this decree to apply criminal sanctions to those activities which might have occasion to use the subject matter for legitimate purposes would serve no useful purpose." Neither Justice, however, saw any reason for anticipating any difficulties in applying the Massachusetts criminal laws to those situations where exemption might properly attach. In fact, in replying to the Brennan-Warren-Fortas opinion, they completely ignored the subject.

E.

THE CONSTITUTIONAL CRITERIA ARE NOT APPLIED INDEPENDENTLY IN CRIMINAL CASES

The Brennan-Warren-Fortas requirement, voiced in their *Fanny Hill* opinion at page 6 that:

> . . . A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. *Each of the three federal constitutional criteria is to be applied independently.* . . (Our emphasis.)

is not so startling when one considers that the Court in *Fanny Hill* was reviewing an injunctive decree rather than a criminal conviction.[43]

It does not follow, however, that the criteria are applied independently in criminal cases, nor does it mean that where there is a proper finding in a criminal case that the appeal is to prurient interest (which, as defined in the Model Penal Code, includes patent offensiveness) the subject matter may still have redeeming social im-

[43] Although Justice Brennan drew attention to this distinction in footnote 3 of his opinion, the reference was largely ineffectual, judging from the initial analysis of the opinion by many of the judges and prosecutors.

portance under the circumstances at issue. In a criminal case, a finding of social importance would necessarily be inconsistent with the finding that the prurient interest test had been met.

In the review of an injunction, the United States Supreme Court is confronted by a decree forbidding *all* distributions and encompassing a myriad of fact situations. A criminal conviction embraces one given set of facts. The broad scope of the inquiry in an injunction situation requires that the tests be applied independently, so that *all* factual situations are considered.

For example, assuming slight historical value, as hypothesized by the Massachusetts Supreme Court[44] — what of the possible distributions to literateurs who might wish to study *Fanny Hill* for its historical significance in the development of the English novel, or the sociologists, who might have occasion to refer to it in their studies, or attorneys who might study it in connection with efforts to arrest the spread of pornography? Were those distributions to be permitted under the decree?

It is important to bear in mind that the Massachusetts statutes under consideration by the High Court, both criminal and civil, allowed no specific exemptions

[44] We do not understand the Massachusetts Supreme Court to have so found. The Court said, "We are mindful that there was expert testimony, much of which was strained, to the effect that Memoirs is a structural novel with literary merit; that the book displays a skill in characterization and a gift for comedy; that it plays a part in the history of the development of the English novel; and that it contains a moral, namely, that sex with love is superior to sex in a brothel. But the fact that the testimony *may* indicate this book has some minimal literary value does not mean it is of any social importance. . . ." (Our emphasis.) The Massachusetts Supreme Judicial Court could still, without further evidence, find no historical or literary value and supply the missing ingredient of "utterly without social value." The trial court judge did just this in *G. P. Putnam's Sons v. Calissi*, 86 N. J. Super. 82. 95, 205 A. 2d 913, Judge Pashman said, "Those who contend that *Fanny Hill* is a work of literary value because it affords insight into the life and manners of mid-18th century London must necessarily have an overwhelming sense of humor. Resort to *Fanny Hill* to study or authenticate the mores of those times would be the nadir of research. . ."

or defenses for situations which did not involve "pandering." Compare in this regard, the A.L.I. recommendations contained in Section 207.10 (4) (c) of the Model Penal Code (1957 draft) which provides:

> The following shall not be criminal offenses under this section. . .
>
> (c) Dissemination to institutions or individuals having scientific or other special justification for possessing such material . . .

Moreover, the Massachusetts statutory procedure authorized "collateral uses" of the injunctive decree, which further gave the impression of inhibiting legitimate use of the book.[45] Footnote 4 of the Brennan-Warren-Fortas opinion noted that Section 28H of the Massachusetts injunctive statute, made a decree that a book was obscene "admissible in evidence" in a criminal prosecution under Section 28B and provided that "if prior to such offense a final decree had been entered against the book, the defendant, if the book be obscene . . . shall be 'conclusively presumed to have known' "[46] the book to be obscene. Justice Brennan's opinion noted at footnote 5 that such "collateral uses of the declaration" would have a "serious inhibiting effect on the distribution (legitimate) of the book. . ."

Under a strict interpretation of the Massachusetts statutes, the distributions noted above (to literateurs, sociologists, etc.) would have been barred by the Massachusetts decree. To draw in focus the constitutional issue underscored by the Brennan-Warren-Fortas opinion, one need only compare in contrast the results which should follow in the criminal forum, were the same factual situation to exist. Such distributions are not a violation of the obscenity laws. There is absent the intent to pander. The predominant appeal of the material is not to prurient interest, but rather, to a legitimate social purpose which has social value.

[45] Once again, assuming the book in issue has legitimate uses.

[46] Section 28B made the distribution, etc. of a book, knowing it to be obscene, a criminal offense. The A.L.I. severely criticizes the "conclusive presumption" of the Massachusetts procedure. See note 4.

Had the Massachusetts statutory scheme authorized a defense or exception for such situations, the Brennan-Warren-Fortas opinion would not have been necessary and the split of the justices that constituted the majority of the Court in *Mishkin* might never have occurred. At the very least, that trio of justices would have been forced to come to grips with the larger issue.

The failure of the Massachusetts statutory procedure to authorize specific exemptions offered the three justices a collateral issue upon which to cast their vote. We cannot fault the opinion on this ground, however, inasmuch as the rationale is basically sound, even though the supporting facts for the "parry" indicate a great deal of grasping for straws, as noted by Justice Clark in his dissent. The probabilities are that the opinion, properly understood, may do much toward unraveling the misunderstandings which surround many of the Court's past decisions.

Our criticism, however, is directed not at the rationale, with which we take no issue, but rather at the manner in which it was expressed—or more precisely, what it left unexpressed. The opinion fails to express the obvious—that the theory of "independent" tests, relating as it does to variable obscenity concepts, has limited application to the injunctive type proceeding and is not to be carried over and applied carte blanche in criminal areas. If the three justices are to be consistent, they would have to agree that in a criminal case the "dominant theme, prurient appeal" test and "social value" test coincide, so that in the criminal forum there is but one, and not several independent tests. It should be noted that, in reviewing the book *Housewife's Handbook on Selective Promiscuity*, the majority in *Ginzburg* did *not* apply the social value test independently, but rather considered only the predominant appeal of the material in the light of the precise facts being reviewed.[47]

In criminal cases, it is at complete odds with the "variable" concept expressed by the majority opinion in *Mishkin* and *Ginzburg* to say either that the "utterly

[47] The Court said, at page 39: ". . . we cannot conclude that the court below erred in taking their own evaluations of its face value and declaring the book as a whole obscene *despite the other evidence*. . . ." (Our emphasis.)

without redeeming social value" phrase is an independent test, or that it is a necessary part of the definition of "obscene." If the dominant appeal of the material is aimed at prurient interests as defined in the Model Penal Code, then the conduct is in the area of criminal activity and the subject matter is utterly without redeeming social importance under the circumstances. In criminal cases, unlike the situation which exists in injunction cases, a specific set of facts are in issue and the two tests are equivalents.

If the variable approach to obscenity is to be followed, then it must follow that it is not the subject matter itself which is "utterly without social importance," but rather the manner in which the subject matter is employed.[48] The social value factor in a criminal trial can more properly be stated in the form of a jury instruction relating to conduct; such as:

> "In order to find the defendant guilty of the charge, you must find that the circumstances under which the material was presented and disseminated in the market place by the defendant was utterly without redeeming social importance . . ."

F.

"FANNY HILL" WAS NOT CLEARED BY THE COURT

In recognition of the practical "facts of life" surrounding the publication of *Fanny Hill*, the Justices Brennan-Warren-Fortas opinion went on to say:

> "It does not necessarily follow from this reversal that a determination that Memoirs is obscene in the constitutional sense would be improper under all circumstances. . . . Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance. . . ."

[48] See *Ginzburg*, at page 38: "And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. . . ."

To grasp the full significance of this language requires an understanding of additional facts surrounding the recent publications of *Fanny Hill.*

Prior to May of 1963, *Fanny Hill* had been printed and distributed only by fly-by-night pornographers in under-the-counter transactions. Typical of this operation was that of Richard J. Haddad in Los Angeles, California. When on November 30, 1962, the Los Angeles Sheriff's vice squad raided his operation, he was found to be printing and distributing three classifications of obscene matter: The first of these was sado-masochistic material such as *Bound in Rubber, Female Sultan, White and Lash, Bondage Slave, and Bondage Discipline at Boadhaven.* A step lower, he reproduced paperbacks like *Sex Life of a Cop, Rape Me Again,* and *Incest for Renee.* At the bottom of the ladder were the paperbacks *Devil's Advocate, Head Humper, Down She Goes, Venus in India, Memoirs of Josephine Mitzerbacker,* and *Memoirs of Fanny Hill. Fanny Hill* did not get into publication in Los Angeles in November, 1962—but only because of the action of the Sheriff's office which stopped the operations with the arrest of Richard Haddad.

Six months later, however, G. P. Putnam's Sons, in pressing the line between candor and shame,[49] introduced a hard-back cover of *Fanny Hill* in over-the-counter sales, with a first-print run of 7,000 copies. Later printing of the hard cover was to run this number up to about 40,000 copies.[50] Before the year ended, Putnam's Sons brought out its paperback edition.

The California and New York smut industry was not to be outdone.

Running in competition with the paperback edition of Putnam's Sons in late 1963 was the Brandon House edition of *Fanny Hill* (BH901), printed and distributed by Milton Luros[51] of 7311 Fulton Avenue, North Holly-

[49] In recent years, Putnam's Sons has published such erotica as *Candy, Krafft-Ebbings Psychopatia Sexualis, Perfumed Garden,* and *Ananga Ranga.*

[50] Testimony of Walter Minton, president of Putnam's Sons, in *Illinois v. Paul Romaine* (criminal prosecution for sale of *Fanny Hill* in Chicago, Illinois).

[51] On Friday, January 14, 1966, Milton Luros and eight of his associates were convicted by a federal jury in Sioux City, Iowa, of mailing and shipping 14 obscene nudist magazines and six lesbian-type paperback books into Iowa. See NDR. Special Edition, Vol. III, No. 3, of March, 1966.

wood, California, also a publisher of girlie magazines, nudist magazines, and sex (predominantly lesbian type) paperbacks.

Edwin A. Schnepf of 10539 Burbank Boulevard, North Hollywood, California, also a publisher of girlie magazines, nudist magazines, sex tabloids, and sex paperback books[52] placed his *Fanny Hill* edition on the market also, (All Star 10). It followed *Route 69* (AS 9) and in turn was followed by *The Love Teacher* (AS 11) and *Lesbo Hotel* (AS 12).

Fitz Publishing Co. of Los Angeles, distributed nationally by Golden State News (GSN), which also distributes girlie magazines, nudist magazines, and sex paperback books also brought out its paperback edition.

New York smut publishers followed the lead of the California industry with their own editions.

A number of police actions followed. In July of 1963, the Corporate Counsel of the City of New York and a group of New York County District Attorneys sought an injunction against its sale in New York.[53] On July 31, 1963, a Chicago Grand Jury returned a criminal indictment against Paul Romaine for the sale of Putnam's Sons hard-cover edition of *Fanny Hill.*[54] On February 10, 1964, the Attorney General of Massachusetts filed a petition in the Superior Court requesting the Court to hold the Putnam's Sons paperback edition of *Fanny Hill* to be obscene and enjoin its sale in Massachusetts. On February 14, 1964, the Attorney General of Rhode Island filed an *in rem* civil action against the *Fanny Hill* edition published by Milton Luros.[55] In April and

[52] In March, 1965, a Los Angeles Superior Court jury held five All Star paperback books which were submitted to it to be obscene. *California v. Schnepf,* S. C. 289205. The titles were *Beds of Canyon Grove* (AS 3), *Sin Island* (AS 4), *Women of Beaver Mountain* (AS 6), *Suburban Sexpot* (AS 8), and *The Love Teacher* (AS 11).

[53] On July 10, 1964, the Court of Appeals denied the injunction in a four-three decision.

[54] *People of the State of Illinois v. Paul Romaine* (unreported, in the Circuit Court of Cook County, Criminal Division). On April 30, 1965, the jury entered a guilty verdict. The case is currently on appeal.

[55] *J. Joseph Nugent, Attorney General of Rhode Island v. Fanny Hill* (Providence, Plantation Superior Court M. P. 6467), On February 27, 1964, Judge John E. Mullin entered a temporary restraining order against its distribution. The publisher did not file an answer until January 19, 1965. The case is pending.

October of 1964, criminal proceedings against the All Star and Brandon House *Fanny Hill* versions were filed by the District Attorney of Los Angeles County.[56] When the Bergen County, New Jersey, Prosecutor threatened criminal prosecution, the publisher brought a civil action asking for injunctive relief.[57] In some areas, the book was withheld from distribution under threat of prosecution.

When the remarks of Justice Brennan are considered in the light of the publishing history of *Fanny Hill*, noted above, it is abundantly clear that such distributions of the book are prosecutable under the state obscenity statutes.

---

[56] A newly elected Los Angeles County District Attorney dismissed the charges against the All Star and Brandon House *Fanny Hill* editions following his election in November, 1964.

[57] *G. P. Putnam's Sons, a corp. v. Guy W. Calissi, Bergen County Prosecutor.* On December 7, 1964, Judge Pashman held the book to be obscene, 86 N. J. Super. 82, 205 A. 2d 913. The case is presently on appeal.

CONCLUSION

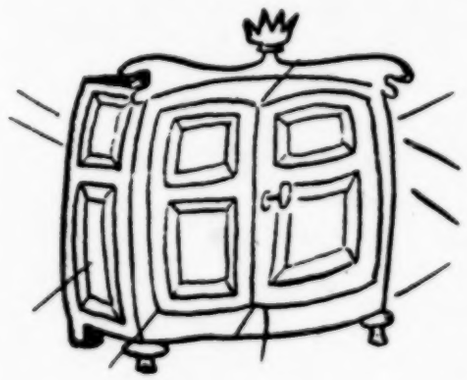
In *Ginzburg* and *Mishkin*, a solid majority of the Court made it impossible for the reluctant prosecutor to explain away his continuing failure to carry out his duties under the obscenity laws. No longer can he place the blame upon the High Court and the confusion alleged to have been engendered by its past decisions.

Defense arguments based upon the "hard-core" myth and a subjective knowledge requirement have been swept from the courtroom.

In these three decisions, the High Court has charted the prosecutor's blueprint for success. The directive is crystal-clear. The proper forum is the criminal courts. The attack should be against the conduct of the defendant in violating recognized community standards.

The Emperor's New Clothes

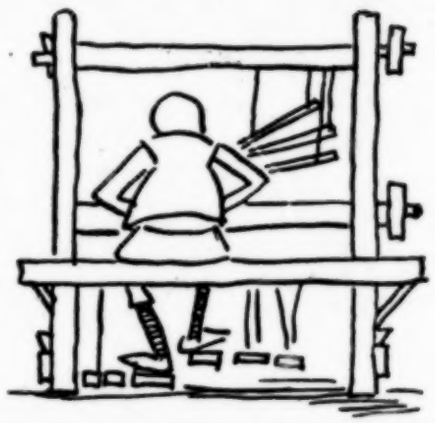
Many years ago there was an Emperor who was so extremely fond of beautiful new clothes that he spent all his money on being superbly dressed. He took no interest in his army and it was only to show off his new clothes that he went to the theatre or for a drive in the country. He had a garment for every hour of the day, and just as you may say of a king, "He's in his council," it was always said of this Emperor, "He's in his wardrobe".



The big city, where he lived, was full of life and activity, and strangers were continually arriving. One day two swindlers turned up; they pretended to be weavers and claimed that they knew how to weave the most beautiful

materials imaginable. Not only were shades and patterns of a rare beauty, but the clothes made from this fabric had the strange quality of being invisible to any person who wasn't fit for his position or else was stupid beyond excuse.

"Why! They must be wonderful clothes," said the Emperor to himself, "wearing them I could find out if any of the men I employ are unfit for their post, and I can distinguish between the clever and the stupid. Yes, they must weave that cloth for me at once." Then he gave them a lot of money in advance so that they could begin to work.



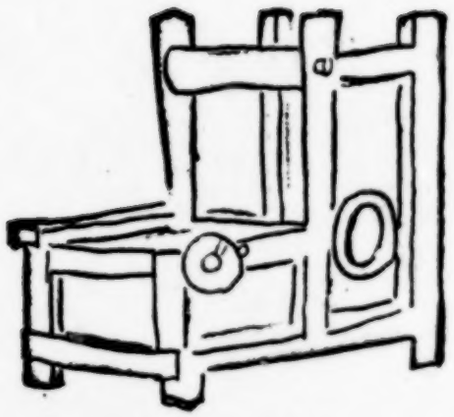
At once they put up two looms and pretended to be working, though in fact the loom was quite empty. They had the cheek to demand the purest silk and the costliest gold thread, which they tucked away in their own bags, and then set to work on the empty looms and that until the small hours of the night.

"Now I should like to know how they are getting on with the cloth," thought the Emperor, but he did feel rather ill at ease knowing that those who were stupid or unfit for

their post wouldn't be able to see it. Still, for his own part he was confident that he didn't need to worry, but all the same he would rather send someone else first to see how things were. All over the town people knew about the magic power of this cloth, and they were all keen on seeing how incapable or stupid their neighbours were.

"I'll send my honest old premier to the weavers," thought the Emperor, "he's the best one to see what the material looks like, for he's clever, and nobody could be better suited to his post than he is."

Now the kind old premier entered the hall where the two swindlers sat working the empty looms. "Good gracious me!"



thought the old premier opening his eyes wide, "I can't see anything."

But of course he didn't say so.

The two swindlers invited him to inspect the loom and asked if he didn't find the colours and the design quite perfect? They pointed to the empty loom, and the poor old premier opened his eyes even wider than before, but he couldn't see anything — for there wasn't anything to be seen. "Dear me," he thought, "Could I really be stupid? I never thought so, no one must get to know! Could it be that I am not fit for my post? No, it'll never do to tell them that I can't see the cloth."

"Well, what is your opinion?" asked the one who was pretending to weave.

"Oh, it's so pretty, quite ravishing," said the old premier looking through his glasses, "what a design and what colours! Indeed, I'll tell the Emperor that I'm very satisfied."

"Ah, we're pleased to hear that," said the two weavers, and now they named the colours and explained the unu-

sual design. The old premier listened carefully that he might be able to repeat everything to the Emperor, and so he did.

Now the swindlers demanded more money, and more silk, and more gold thread; they needed it for the weaving. Everything went straight into their own pockets, not a thread was placed in the loom, but still they continued as before, working the empty loom.

Soon after the Emperor sent another honest official to see how the weaving was getting on, and whether the cloth would be ready soon. He had the very same experience as the premier, he looked and looked, but as there was nothing but the empty

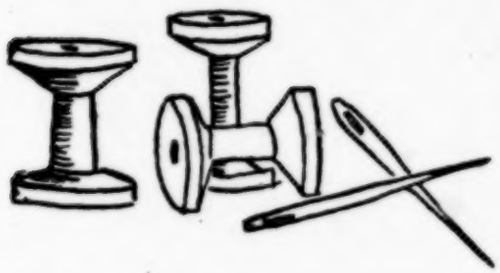
looms, he saw nothing. — "Look, isn't it an attractive piece of cloth?" asked the two swindlers, and they carefully explained the magnificent design which wasn't there at all.

"I know I'm not stupid," thought the man, "so it must be my good position I'm unfit for. That's very strange, but I mustn't let anyone know." So he praised the cloth that he didn't see, and he expressed his delight in the beautiful colours and the wonderful design. "Yes, it is unbelievably lovely," he told the Emperor.

The whole town was now discussing this splendid material.

Now the Emperor decided to see it himself, while it was still in the loom. Together with several select people — among them the two honest, old officials who had been there before — he went to see the cunning swindlers who were now weaving with all their might, but still without thread.

"Look, isn't it magnificient?" said the two honest officials. "Have Your Majesty seen the pattern, the colouring!" Then they pointed to the empty loom, because they thought that all the other people could see the material.



"What ever is this?" thought the Emperor, "I can't see a thing! This is terrible, am I really stupid? Am I not fit to be Emperor? This is the most frightful thing that could happen to me!" — "Why yes, it is very beautiful," the Emperor said, "it has my imperial approval." And he gave a benevolent nod as he looked at the empty loom; he wouldn't admit that he couldn't see anything. His entire escort gazed and gazed, but they made no more of it than all the others, but like the Emperor they all exclaimed, "How very beautiful!" Now they advised him to have a garment cut from this wonderful material and wear it for the first time in the grand procession that was to take place very soon. "It's magnificent, superb, out-

standing!" they all said to one another, and they were all incredibly pleased with it. The Emperor conferred a knigthood on each of the swindlers and gave them a cross to wear in their button-holes as well as title of Imperial Weavers.

The entire night preceding the procession the swindlers sat working with more than sixteen candles lit. People could see they were busy getting the Emperor's new clothes ready. They pretended to take the material off the loom, they cut away at the air with big scissors, and they sewed with needles without thread, and at last they declared, "Look! The clothes are all ready now."

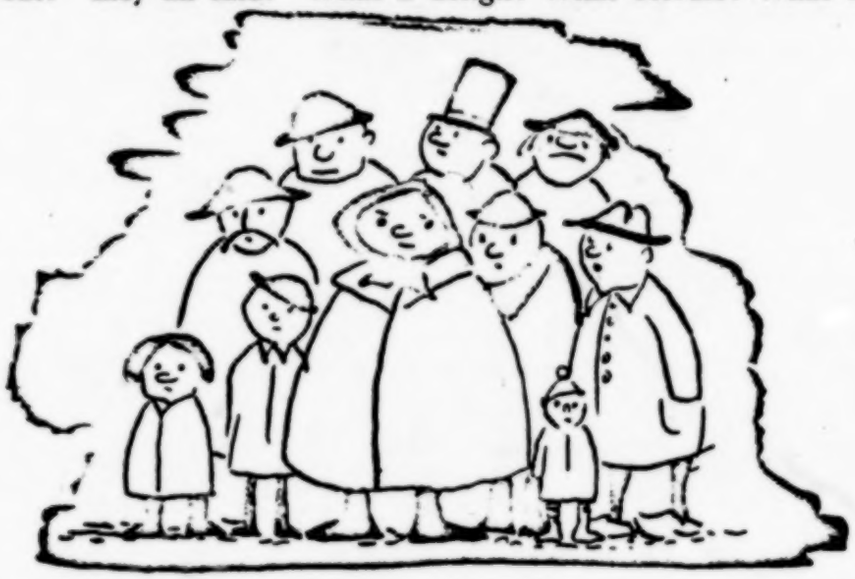
The Emperor went personally to the weavers escorted by the most distinguished courtiers, and the two swindlers each held out their arm as if they were holding something and said, "Look, here are the breeches – here is the robe – here is the mantle." And so on. "They are all as light as gossamer, you can hardly feel that you are wearing anything, but that's just the fine thing about them.

"To be sure", said all the courtiers, but they couldn't see a thing, for there wasn't a thing to be seen.

"If now Your Imperial Majesty most graciously will take off your clothes," the swindlers said, "then we'll fit you with the new ones in front of the big looking-glass."

The Emperor took off his clothes, and the swindlers pretended to hand him one by one the new garments they were supposed to have made, and they pretended to be fastening something at his waist – it was the train, and the Emperor turned and twisted in front of the glass.

"Heavens, how well they suit Your Majesty, and what a perfect cut!" they all said. "What a design! What colours! What a



precious garment!" – "They are waiting outside with the canopy that is to be carried above Your Majesty in the procession," announced the Master of Ceremonies.

"Good", said the Emperor, "I'm quite ready." "Isn't it a perfect cut?" And he turned round once more in front of the glass to give them the impression that he really was admiring his fine garment.

The chamberlains who were to carry the train fumbled about on the floor as if they were picking up the train. They walked along with outstretched hands in order to hide the fact that they couldn't see anything.

Now the Emperor was walking in the procession under the beautiful canopy, and all the people in the street and at the windows cried, "Goodness, how the Emperor's new clothes look marvellous! What a splendid train on his mantle! What a perfect fit!" Nobody would admit that he didn't see anything, because that was as good as saying that he wasn't fit for his job or else that he was stupid. Neved before had the Emperor's clothes been such a success.

"But he hasn't got anything on!" cried a little child. "Gracious me, did you hear what this innocent child said?" exclaimed the father, and they whispered from one to the other what the child had said.

"He hasn't got anything on! A little child is saying that he hasn't got anything on!"

"Why! He hasn't got anything on!" everybody shouted at last. The Emperor felt terribly embarrassed, for it seemed to him that people were right, but he thought to himself, "I've got to go through with the procession." And he carried himself even more proudly, and his chamberlains walked behind him carrying the train that wasn't there.